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RAI CHAND
v.
MATHURA
PRASAD.

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

PEARSON, J.—It appears to us that the Subordinate Judge's decree dismissing the plaintiff's suit was appealable to the Zila Judge under s. 540 of the Procedure Code, and that the Zila Judge should have entertained it and disposed of it with reference to the provisions of s. 565 of the Code. Both parties had appeared in the Court of first instance, and their witnesses had been examined in their presence. Nothing remained to be done except to hear arguments. If the plaintiff or his pleaders did not return after having been allowed to leave the Court at the hour appointed for the argument, the Subordinate Judge (if he did not think fit to adjourn the case to another day) might have proceeded to decide the case on the merits. Ss. 102 and 103 of the Code seem to be inapplicable to the circumstances. We remand the case to the lower appellate Court that it may dispose of the appeal according to law. The costs of this appeal will abide and follow the event.

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November 25.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

NANHAK JOTI AND ANOTHER (DEFENDANTS) v. JAIMANGAL CHAUBEY,
AND OTHERS (PLAINTIFFS)*.

Joint Hindu Family—Joint Family property—Joint Family debt—Execution of decree against Father—Rights of Sons.

R, a Hindu father, gave certain persons a bond in which he hypothecated the joint undivided property of his family. Such persons obtained a decree against *R* on such bond, in the execution of which "such rights and interests only as *R* had, as a Hindu father, in a joint undivided family" were put up for sale. *Held* that, although *R* might have, as a Hindu father, a power of dealing with the interests of his sons, that circumstance would not make such interests his own, so as to pass them by a sale which affected his own interests only, and the auction-purchasers could be held only to have purchased his interests.

THIS was a suit for possession of a four-anna share of a certain hál. Raj Kumar had executed a bond for Rs. 500 on the 26th ber, 1872, in which, describing himself as the proprietor of four-anna share, he hypothecated it as collateral security for payment of such money. On the 19th February, 1878, the s of such bond sued Raj Kumar thereon, and obtained a

id Appeal, No. 576 of 1880, from a decree of M. Brodhurst, Esq., Judge, dated the 3rd June, 1880, reversing a decree of Babu Ramkali Chaudinade Judge of Benares, dated the 2nd April, 1880.

decree against him enforcing the hypothecation of such share. The share having been attached and proclaimed for sale in the execution of that decree, the minor sons of Raj Kumar, on the 3rd December, 1878, objected to the sale on the ground that the share did not belong to their father, but was joint ancestral property. On the 19th December, 1878, the Court made an order declaring that the intended sale should be confined to "such rights and interests of Raj Kumar in the share as a Hindu father has in a joint family." The share was put up for sale on the 20th December, 1878, and was purchased by the obligees. The sale certificate granted to the purchasers declared that they had purchased only "such rights and interests in the share as Raj Kumar, according to Hindu law, had in joint ancestral property". The auction-purchasers, on the 3rd June, 1879, took possession of the share; and on the 13th June, 1879, conveyed it to Nanhak Joti and Gauri Partab Kuar, the defendants in this suit. The present suit was thereupon instituted on behalf of the plaintiffs, the minor sons of Raj Kumar, against their father, the auction-purchasers, and the assignees of the auction-purchasers, in which the plaintiffs claimed possession of the share on the ground that it was the joint ancestral property of their family, and its alienation by their father was invalid, such alienation having been made for unlawful and unnecessary purposes. The assignees of the auction-purchasers alone defended the suit. They set up as a defence to it, amongst other things, that the share had been alienated by Raj Kumar for the maintenance of his family and other necessary purposes and such an alienation was lawful. The Court of first instance held that, inasmuch as the bond-debt had been incurred by Raj Kumar for necessary and lawful purposes, the rights and interests of his sons in the share passed to the auction-purchasers by the sale to them of their father's rights and interests therein. On appeal by the plaintiffs the lower appellate Court, in regard to the sale-proceedings, held that the auction-purchasers only acquired the rights and interests of Raj Kumar by the sale and gave the plaintiffs a decree for the possession of the share and a declaration that the auction-purchasers had only such rights and interests.

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The assignees of the auction-purchasers appealed to the High Court, contending that the auction-purchasers had acquired by the sale the entire interests of the family in the share.

The *Junior Government Pleader* (Babu *Dwarkanath Banarji*), *Munshis Hanuman Prasad and Kashi Prasad*, and *Babu Oprokush Chandar Mukarji*, for the appellants.

Messrs. *Colein and Niblett* and *Babu Baroda Prasad Ghose*, for the respondents.

The judgment of the High Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The defendants-appellants obtained a decree against Raj Kumar, the father of plaintiffs, and against his cousin on a bond in which the joint family property was hypothecated. They executed the decree by attaching the whole joint property. The sons of Raj Kumar, plaintiffs, took objections in execution to the effect that only their father's right could be sold, and the Munsif executing the decree made an order that "the sale will be of such rights and interests of the debtor Raj Kumar in a four-anna share of zamindari and sir-lands as a Hindu father has in a joint family;" and he added:—"The extent of such interests cannot now be determined in the miscellaneous department." The decree-holders purchased the property sold, and the sale-certificate declares that such rights only were sold as Raj Kumar had as a Hindu father in a joint family possessed in the property advertised. The Judge has held that the sale only passed Raj Kumar's individual interest, and it appears to us that we cannot say he is wrong, looking at the sale proceedings, particularly the sale-certifi-

is urged that the intention was to sell, not only Raj Kumar's interest, but also his sons', supposing it should be found in the latter suit that the latter could be sold in execution of such a decree as had been obtained in this case against Raj Kumar. The question as to what interests could be sold under the decree against Raj Kumar depended on whether the decree was against him in his representative capacity, and was one

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which the Court executing the decree could and should have determined; and I do not think that it can be said that this question was the one which the Munsif disposed of in his order. The question about which he appears to have been doubtful was the extent of the interest which a Hindu father by Hindu law could be held to possess in joint family property, and he refused to determine this because, as he expressly says, the extent of such rights cannot be determined in the miscellaneous department. So far he may be right, but he would not have been right if he had, as is suggested, refused to determine and had left open the question as to what property could be sold in execution of the decree he was executing, whether under it the sons' interests were saleable. The Munsif, considering that the extent of the father's right could not be determined in the miscellaneous department, limited the sale to the father's interest, leaving its extent to be afterwards determined. If he meant to do what is suggested by appellants' pleader his order does not express his meaning, and it would not have been a proper order. The language of the order and of the sale-certificate is plain, and under the latter the auction-purchasers can be held only to have bought Raj Kumar's interest. Raj Kumar may have, as a Hindu father, a power of dealing with his sons' interests, but that circumstance will not make those interests his own, so as to pass them by a sale which affects his own interests only. I think we should accept the plain language of the sale-certificate. I would dismiss the appeal with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

UMRAO LAL AND ANOTHER (DEFENDANTS) *v.* BENARI SINGH AND ANOT
 (PLAINTIFFS).*

Instalment-Bond—Hypothecation—Declaratory decree—Res judicata—Act
 1877 (Civil Procedure Code), s. 13.

In 1864 the obligee of an instalment-bond, in which certain immov-
 erty was hypothecated as collateral security for the payment of the in-

* Second Appeal, No. 544 of 1880, from a decree of Maulvi Zai Subordinate Judge of Shahjahanpur, dated the 6th March, 1880, affirmed of Babu Becharam Chakarvarti, Munsif of Deoria, dated the 15th Decr