APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

TRIMBAK BA'LKRISHNA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NA'RA'YAN DA'MODAR DA'BHOLKAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1884
April 9.

Hindu law—Mitakshára—Father's authority to bind the interests of his sons in an ancestral property—Mortgage by father of ancestral property—Rights of a purchaser at Court sale of an undivided share of a co-parcener—Civil Procedure Code (Act XIV of 1882), Secs. 334 *and* 328*—Decree against father upon a mortgage of family property—Effect of decree ordering sale of mortgaged property—Purchaser at Court sale when bound to go behind decree and inquire as to whether the debt was properly incurred—Parties.*

D., the father of the defendants, by a mortgage dated October, 1869, mortgaged a house together with other property to B., the father of the plaintiff. B. sued D. upon the mortgage and obtained a decree directing the sale of the mortgaged property. The execution sale took place in July, 1877, and the plaintiff (the mortgagee's son) became the purchaser of the house. On attempting to take possession he was resisted by the defendants (sons of the mortgagor), who alleged the house to be ancestral property, and denied the plaintiff's right to more than the third share to which the father had been entitled.

Held by the High Court, on appeal, upon the authority of *Girdhárilal* v. *Kantoo Lal*(1), as explained in *Suraj Bunsee Koer* v. *Sheo Prasád*(2), that the shares of the defendants were validly bound by their father's mortgage, as it had been found by the lower Court that the debt, in respect of which the mortgage had been executed, had not been contracted by their father for improper or immoral purposes; but that as the purchaser at the execution sale (the plaintiff) was the mortgagee's son the question arose whether he could be held to be a stranger to his father's suit on the mortgage, and, as such, not bound to go behind the decree and make inquiry as to whether the debt had been improperly incurred. This would depend on the circumstances under which he and his father were living and the relation existing between them. The case was, accordingly, remanded for a determination of the question whether the plaintiff was a stranger to his father's suit.

Held that the defendants, not being joint with their father at the date of the suit, were not represented by him, and would be entitled to redeem, but only on condition, if the plaintiff insisted on it, of their redeeming the whole of the house. Unless the mortgage-deed expressly provided for the redemption of the sons' interests on payment of a proportionate part of the debt, the mortgage should be treated as one and entire; the father's authority, according to *Girdhárilal's* case(1), being to apply or charge the whole property to or with the payment of his debts not improperly incurred.

*Second Appeal, No. 571 of 1882.

(1) 1 Moo. Ind. Ap., 321. (2) 6 Moo. Ind. Ap., 106.

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Where a decree passed in a suit upon a mortgage directs the mortgaged property to be sold, the decision in *Deendyal's* case(1), which limited the right, title and interest which passed under the auction sale to the father's share, does not apply.

THIS was a second appeal from the decree of Sir W. Wedderburn, District Judge of Poona, amending the decree of the Joint Subordinate Judge of the same place.

The plaintiff's father Bálkrishna obtained a decree against the defendant's father Dámodar upon a mortgage bond, dated October, 1869, and in execution of that decree caused the mortgaged property, including the house—the subject of the suit—to be attached and sold. Subsequently to the mortgage, but before the filing of the suit, the family ceased to be joint, and a partition of the property was made, though not by metes and bounds. The sons were not parties to the suit. At the Court sale which took place on the 23rd July, 1877, the plaintiff purchased the house, and proceeded to take possession. He was resisted by the defendants. He thereupon applied to the Court under sections 334 and 328 of the Civil Procedure Code (Act X of 1877). His application was rejected on the 22nd August, 1878, by the then Joint Subordinate Judge at Poona, who held that the plaintiff had acquired, by the Court sale, a right only to Dámodar's (the father of the defendants) undivided share in the family house to the extent of one-third only, and that the course open to the plaintiff was to recover it by a suit for partition.

The plaintiff brought a suit in the Subordinate Judge's Court at Poona to set aside the order rejecting his application, and to establish his right to the whole of the house in dispute, and to recover possession of the same with mesne profits.

The defendants *(inter alia)* contended that the house in question was the ancestral family property, and, as such, was not liable to be sold in execution of the decree passed against their father alone; that the decree was collusive, and that the debt was contracted by their father during their minority for immoral purposes, and that he was not competent to mortgage the family estate for such debts, and that they had separated from their father—a partition having been made.

(1) 4 Moo. Ind. Ap., 247.

The Subordinate Judge at Poona, before whom the suit came for disposal, found that the property in dispute was ancestral property, and that, though it did not absolutely belong to the father of the defendants, who was only entitled to one-third part of it, the shares of the defendants were nevertheless liable for their father's debts; that the debts were contracted for family necessity, and not for immoral or improper purposes; and, lastly, that the plaintiff was entitled to recover possession of the whole house in dispute from the defendants. He rejected the plaintiff's claim as to mesne profits.

The defendants appealed from this decree. The District Judge of Poona amended the lower Court's decree by decreeing that the plaintiff was entitled to only one-third of the house in dispute, and directed that he should recover possession of the said one-third share.

The plaintiff appealed to the High Court.

Mahádev Chimnáji Apte for the appellant.—The decree, in execution of which the property was sold, was on a mortgage by the father of the respondents for purposes found by the lower Courts not to be improper or immoral. What passed to the purchaser at the Court sale was the interest of the father as well as of the sons—*Girdhárilal* v. *Kantoo Lal*[1]; *Muttayan* v. *Sangili Vira*[2]. The Court sale was, therefore, binding on the sons. Even private alienations by the father are so binding—*Fakirchand* v. *Motichand*[3]; *Náráyánáchárya* v. *Narsoo Krishna*[4]; *Kastur Bhavání* v. *Appa and Sitárám*[5]. That the sons did continue to be joint with their father at the time the suit was brought and the decree obtained, makes no difference. The father as manager had authority to mortgage; and what substantially passsed by the decree, was not only the interest of the father alone, but the entire interest in the property mortgaged—*Sangáppa* v. *Sáhebánna*[6]. It is the substance, and not the form, of the decree that ought to be looked to.

(1) L. R., 1 Ind. Ap, 321; S. C., 14 Beng. L. Rep., 187.
(2) L. R., 9 Ind. Ap. 128; S. C., I. L. R., 6 Mad. 1.
(3) I. L. R., 7 Bom., 438.
(4) I. L. R., 1 Bom., at pp. 262, 266.
(5) I. L. R., 5 Bom., 621.
(6) 7 Bom. H. C. Rep., at p. 146, A. C. J.

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Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the respondents.—The decree was for the sale of the right, title and interest of the father of the respondents, and the certificate of sale purported to convey the same to the appellant. The question as to what passed by the Court sale must be determined by the nature of the proceedings of which that Court sale was the result At the time the suit was brought against the father of the respondents the family was no longer joint: a partition had been effected between the father and the sons, and the deed registered. The registration of the deed was, therefore, a notice to the mortgagee. If the sons were to be held bound, they ought to have been made parties to suit against their father—*Deendyal Lal* v. *Jugdeep Náráin Singh*(1); *Nanhak Joti* v. *Jaimangal Chaubey*(2); *Bika Singh* v. *Lachman Singh*(3); *Laljee Sahoy* v. *Fakirchand*(4); *Luchman Dass* v. *Giridhar Chowdhry*(5); *Venkat Sami* v. *Kuppaiyan*(6); *Venkataramayyan* v. *Venkatasubramania*(7); *Subramaniyayann* v. *Subramaniyayyan*(8).

It has been frequently held that a decree in a suit against a brother or uncle would not bind the interests of the other co-parceners.

[SARGENT, C. J.—That is so no doubt, but here the decree was in a suit against the father.]

The foregoing cases are of decrees and Court sales in execution of decrees against the father alone. In the present case the father having been no longer a manager of the family, the interests of the sons were not represented in the suit against him alone. They were, therefore, not bound by the decree passed against their father or the Court sale that followed in execution of the decree—*Junoona Persád Singh* v. *Dig Náráin Singh*(9). The mortgagee having elected to sue the father alone, and obtained a decree against him in his individual capacity, the scope of that decree could not be enlarged in execution proceedings so as to embrace the interests of the sons—*Gurusami Chetti* v. *Chinna*

(1) I. L. R., 3 Calc., 198, P. C.
(2) I. L. R., 3 All., 294.
(3) I. L. R., 2 All., 800.
(4) I. L. R., 6 Calc., at pp. 135, 139, 140.
(5) I. L. R., 5 Calc., 855.
(6) I. L. R., 1 Mad., 354.
(7) I. L. R., 1 Mad., 358.
(8) I. L. R., 5 Mad., at pp. 125, 128.
(9) I. L. R., 10 Calc., 1.

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Mannar[1]; *Chocklinga Mudali* v. *Subbaraya*[2]. The appellant in the present case was not a *boná-fide* purchaser, he being the undivided son of the mortgagee (decree-holder) himself—*Rám Bushan* v. *Jebli* [3].

SARGENT, C.J.—This suit was brought by the appellant to recover possession, with mesne profits, of a house bought by him at a Court sale in execution of a decree obtained by his father against Dámodar, father of the respondents. The respondents resisted plaintiff's taking possession, on the ground that he only purchased the undivided share of their father, *viz.*, one-third, and must sue for partition. The District Judge was of opinion that the case was on all fours with *Deendyal Lal* v. *Jugdeep Náráin Singh*[4], and held that plaintiff had only purchased the right, title and interest of Dámodar, and directed that he be put into possession of one-third share of the house in dispute.

The decision in the case of *Deendyal Lal* v. *Jugdeep Náráin Singh*, which has given rise to so much discussion in the several High Courts, has recently been explained and distinguished, from the class of cases of which *Girdhárilal* v. *Kantoo Lal*[5] is the type, by the Judicial Committee in the judgment in *Hurdey Náráyan Sáhu* v. *Bábu Ruder Perkash*[6]. Their Lordships say: "The next and the principal question in the case was, what right or interest in the property, which is the subject of the suit, was acquired by the appellant Hurdey Náráyan by his purchase at the sale in execution of a decree which he had obtained against the father of the respondent Shib Perkashmisser. It appears that Shib Perkashmisser was indebted to Hurdey Náráyan, partly on account of a mortgage and partly for further advances, and that Hurdey Náráyan brought a suit against him in order to recover the debt, and obtained a decree on the 4th March, 1873. The decree was the ordinary one for the payment of the money." "And this case" (which their Lordships, later on, say is precisely like *Deendyal's* case) "is distinguishable from the cases where the father being a member of the joint family governed by the Mitakshára

(1) I. L. R., 5 Mad., 37.
(2) I. L. R., 5 Mad., 133.
I. L. R., 8 Calc., 855.
(3) I. L. R., 4 Ind. Ap., 247.
(4) L. R., 1 Ind. Ap., 321.
(5) L. R., 11 Ind. Ap., 26.

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law had mortgaged the family property to secure a debt, and the decree had been obtained on the mortgage, and for a realization of the debt by means of the sale of the mortgaged property. It is a simple money decree which states that the claim is to recover Rs. 6,335, principal and interest." After setting out the certificate of sale, which was to the effect that "whatever right and interest the judgment-debtor had in the property passed to the said decree-holder's auction-purchaser," their Lordships continue: "Therefore, what was purchased on that occasion were the rights and interests of the father, and this is precisely like the case of *Deendyal Lal* v. *Jugdeep Nárán Singh*", where their Lordships held "that, the purchase being, as it was here, by the person who had obtained the decree, only that passed which the father, the person against whom the decree was obtained, had. The judgment in that case defines what is actually sold." The result of this explanation is that the decision in *Deendyal's* case, limiting the "right, title and interest" which passed under the auction sale to the father's share, is not applicable where the decree directs the mortgaged property to be sold. Whether, if the purchaser was not the judgment-creditor in the case of a mere money decree, the result would be different, is left in doubt.

We may remark here that it has been very generally the practice in the Mofussil to sell property ordered by a decree to be sold by the ordinary process of attachment and sale, and the sale is generally, in terms, the same as in execution of a simple money decree, *viz.*, of the "right, title and interest" of the mortgagor—*Dayáchand Nemchand* v. *Hemchand Dharamchand*(1) and *Náráyánráo Dámodar Dábholkar* v. *Bálkrishna Máhádeo Gadre*(2). In such cases the "right, title and interest" of the judgment-debtor has always been taken to include the entire interest which he had authority to mortgage at the time he executed the deed of mortgage as distinguished from the share of the judgment-debtor which was available to creditors generally at the date of the attachment—*Kasandás Laldás* v. *Prányivan Atmárám*(3); *S. B. Shringarpure* v. *S. B. Pethe*(4).

(1) I. L. R., 4 Bom., 520.
(2) *Ibid.*, 530.
(3) 7 Bom. H. C. Rep., 146.
(4) I. L. R., 2 Bom., 662.

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In the present case the decree directed the sale of the mortgaged property, and, therefore, the District Judge was wrong in holding that the case was governed by the decision in *Deendyal's* case.

Now the case of *Girdhárilal* v. *Kantoo Lal* is stated by the Privy Council in *Suraj Bunsee Koer* v. *Sheo Pershad Singh*(1) to have established two propositions :

1. "That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted; and, secondly, that the purchasers at an execution sale being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings."

This statement of what was determined in *Girdhárilal's* case is also treated as settled law in *Muttayan Chettiar* v. *Sangili Vira Pándia Chinnatambiar*(2).

The soundness of this ruling, as expressed in the first proposition, has been much questioned in the High Courts of Calcutta and Madras—see *Sheo Pershad* v. *Jung Báhádur*(3) and *Arunáchala Cheti* v. *Munisami Mudali*(4), and also very recently at great length by the learned authors of West and Bühler's Hindu Law in the last edition, p. 646; but it is none the less the decision of a Court of paramount authority in the High Courts of this country, and must, as such, in our opinion, be regarded as a binding exposition of the law in this Presidency, as it has already been held to be in the High Courts of Calcutta and Madras. Now, in the present case, the shares of the defendants were validly bound by the mortgage, as it has been found that the debts were not contracted by their father for an improper or immoral purpose;

(1) L. R., 6 Ind. Ap., 106.
(2) L. R., 9 Ind. Ap., 128.
(3) I. L. R., 9 Calc., 395.
(4) I. L. R., 7 Mad., 39.

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but as the purchase was by the mortgagee's son, the question arises, whether he was a stranger to his father's suit, and not bound to go behind the decree. This would depend on the circumstances under which they were living, and the relations existing between them. If he cannot be so regarded, the further question arises, whether the defendants were adequately represented in the suit by their father Dámodar as manager of the family. Otherwise they would stand in the position of persons who are interested in the equity of redemption, and have not been made parties to a suit for foreclosure or sale of the mortgaged property, and whose right to redeem is, therefore, by the general rule not shut out by the decree. The question whether sons would be adequately represented by the father in such a case is, as far as we know, clear of judicial authority in this Presidency, although from what fell from the Court in *Náráyán* v. *Lálúchand*[1] it would appear to have been assumed that *Girdhárilal's* case required it to be answered in the affirmative.

In the High Courts of Calcutta and Madras it has been ruled that the son is not a party to a suit against the father on his mortgage-deed—*Rámphul Singh* v. *Dig Náráyan Singh*[2] and *Ponappa's* case[3]. However, it is not necessary to decide the question in this case, as it is admitted that their family was no longer joint when the suit was brought, and that there had been a partition of the house between the father and his sons into certain definite shares, although not by metes and boundaries, and it would, therefore, be impossibe, under those circumstances, to regard the father as representing his sons in that suit. The defendants would, therefore, be entitled to redeem, but only upon the condition, if the plaintiff insists on it, of their redeeming the whole of the house. The rule of equity is stated by Mr. Spence in his Equity Jurisdiction of the Court of Chancery, p. 666. He says: "The owner of the equity of redemption of part of the estate in mortgage cannot separately redeem his part; the mortgagee has a right to insist that the whole of the mortgaged estate shall be redeemed together",—a rule which applies with still greater force where the mortgage

(1) I. L. R., 6 Bom., 564. (2) I. L. R., 8 Calc., 525.
(3) I. L. R., 4 Mad., 1.

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property consists of a house—(see also Fisher on Mortgage, p. 756). Unless, therefore, the mortgage-deed expressly provided for the redemption of the son's interests on payment of a proportionate part of the debt, the mortgage must be treated as one and entire, the father's authority, according to *Girdhárilal's* case, being to apply or charge the whole property to or with the payment of his debts not improperly incurred. We must, therefore, reverse the judgment of the District Judge, and remand the case for the District Judge to determine whether the plaintiff was a stranger to his father's suit, and to pass a fresh decision with reference to the foregoing remarks.

Plaintiff to have his costs throughout.

Judgment reversed and case remanded.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

BHIKA'JI RA'MCHANDRA OKE AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS, *v.* YASHVANTRA'V SHRIPAT KHOPKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

June 20.

Hindu law—Son's liability for father's debts—Execution sale of ancestral property—Decree against father—Money decree—Purchaser at a Court sale.

By the sale of ancestral property in execution of a mere money decree against the father for his separate debt, only the right, title and interest of the father pass to the purchaser, and nothing more; and this holds good whether the purchaser is a stranger or the decree-holder himself.

A purchaser at a Court sale cannot set up the title of a *bonâ-fide* purchaser for value without notice.

Deendyál v. *Jugdeep Nárain Singh*(1), *Hurdey Nárain* v. *Baboo Rooder Perkash*(2) and *Muddun Thakoor* v. *Kantoo Lal*(3) referred to.

Lakhmichand v. *Kastur*(4) and *Sobhágchand Gulabchand* v. *Bháichand*(5) followed.

THIS was a second appeal against the decision of Khán Bahádur M. N. Nánávti, Subordinate Judge of the first class with appellate power at Thána, reversing the decree of the Subordinate Judge of Mahád.

* Second Appeal, No. 54 of 1883.

(1) L. R., 4 Ind. Ap., p. 251.
(2) L. R., 11 Ind. Ap., p. 26.
(3) L. R., 1 Ind. Ap., 321.
(4) 9 Bom. H. C. Rep., 60.
(5) I. L. R., 6 Bom., 205.