

the forest lands, and especially with respect to the culturable or actually cultivated lands thereof, or any portion, and what portion thereof embraced in the present suit?

(2). Have the defendants, subsequently to the grant in question, acquired any such rights as aforesaid?

(3). Have such rights, if any, been retained by the defendants down to the institution of the present suit?

(4). Do they to any, and to what, extent constitute an extinguishment or legal contradiction of the rights otherwise proved by the plaintiffs?

The finding on these issues is to be sent up within three months.

Finding reversed and case remanded.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánabhái Haridás.

JAIRA'M BAJA'BA'SHET AND ANOTHER, (ORIGINAL DEFENDANTS),
APPELLANTS, v. JOMA KONDIA AND OTHERS, (ORIGINAL PLAINTIFFS),
RESPONDENTS.*

1886.
December 6.

Hindu law—Joint family—Mortgage by father—Decree subsequently to father's death against eldest son as heir of father—Minor sons not parties—Sale in execution of family property other than that comprised in mortgage—Subsequent suit by minor sons to recover their shares—Minor sons when bound by decree against eldest son as heir of father.

One Kondia mortgaged certain land to B. and died, leaving four sons, viz., Rághu and the three minor plaintiffs. Subsequently, B. brought a suit on the mortgage against Kondia by his heir, Rághu, for the amount due, and obtained a decree, whereby it was ordered that the amount should be recovered from the mortgaged property, and, if that proved insufficient, from the other estate of the deceased. The minor sons were not made parties to that suit, nor was Rághu sued as representing the joint family. In execution of the decree, B. attached and sold the whole of the joint-family property, the certificate of sale showing that the right, title, and interest of Kondia, deceased, by his heir Rághu, was attached and sold and conveyed to the purchaser.

The three minor sons subsequently brought this suit to recover some of the property, contending that their shares were not bound by the sale.

* Second Appeal, No. 230 of 1884.

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Held, (on the authority of *Bissessur Lál Sahoo v. Mahávítákh Luchmeessur*(1), and reversing the lower Courts' decree) that the property in question having been declared liable for the debt incurred by the father, the intention was that the estate in its entirety should be sold. The minor sons were, therefore, bound by the sale, unless they could prove that the father's debt had been incurred for an immoral and improper purpose.

The case was, accordingly, sent back for trial of an issue upon that point, with a direction that the burden of proof should lie upon the plaintiffs.

THIS was a second appeal from a decision of H. J. Parsons, District Judge of Thána.

One Kondia Bhoir had, in his life-time, contracted a debt, and as security had mortgaged certain land to the appellant No. 2. At his death, Kondia left four sons, *viz.*, one Rághu and the three minor respondents. The appellant No. 2 subsequently brought a suit on his mortgage to recover the amount due. He brought this suit against Kondia, deceased, by his heir, Rághu. He did not join, as parties, the other three sons, the present respondents, nor did he sue Rághu as representing the joint family, but simply as heir of Kondia. He obtained a decree, in which it was ordered that the amount in the suit should be recovered from the mortgaged property, and, if that proved insufficient, from the other estate of the deceased defendant. In execution, he attached and sold the whole of the joint-family property, which was purchased by the appellant No. 1—the certificate of sale showing that the right, title, and interest of the above defendant, Kondia, deceased, by his heir Rághu, was attached and sold and conveyed to the appellant No. 1.

The three minor sons, represented by their mother and guardian, now sued to obtain a declaration of title to, and possession of, the property alleged to have been their ancestral property, which had been sold in execution of the decree obtained against their brother, Rághu.

The defendants alleged that the debt for which the property had been sold, was contracted by the father of the plaintiffs as head of the undivided family and for proper purposes, and contended that the plaintiffs were bound by the sale.

(1) L. R., 6 Ind. Ap., 233.

The Subordinate Judge of Bhiwandi, who tried the suit, allowed the plaintiffs' claim with costs.

The defendants appealed to the District Judge, who confirmed the lower Courts' decree, and rejected the appeal with costs.

The defendants appealed to the High Court.

Máhádev Bháskar Chaubal for the appellant:—The Privy Council decision in the case of *Nanomi Babuasin v. Modhun Mohun*⁽¹⁾ has finally decided that the purchaser, in such a case as the present, is to be regarded as having bought the entire estate. Rághu was sued as heir of his father, and represented his minor brothers the plaintiffs.

Máhádev Chimmnáji Apte for the respondents:—The decree, in execution of which the property was sold, was upon a mortgage, and, so far as the property comprised in the mortgage is concerned, the sale may be good. The property now in question, however, was not comprised in the mortgage. The present plaintiffs, being minors, were not represented by their brother, Rághu, who alone was sued as the heir of Kondia. His interest only should be held bound. The sons' interest in family property, which has not been alienated or mortgaged by the father, cannot be sold in execution of a decree obtained by a creditor of the father, unless they have been parties to the suit. See West and Bühler's Hindu Law, pp. 619, 636. In order that the share of an undivided co-parcener may be affected by a decree, he must be a party to the suit. Here the eldest brother alone was sued, and his interest alone can pass by the sale, even though the debt was for family purposes—*Máruṭi Náráyan v. Liláchand*⁽²⁾; *Kisansing v. Moresk-war*⁽³⁾; *Dásgáradhi v. Joddumoni*⁽⁴⁾; *Máhádevji Vithal v. Sadáshiv*⁽⁵⁾.

SARGENT, C. J.:—In this case one Kondia had contracted a debt to the appellant No. 2, and mortgaged a piece of land to him as a security for the same. After Kondia's death, appellant No. 2 brought a suit against "Kondia, deceased, by his heir Rághu," at

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(1) L.R., 13 Ind. Ap., 1; S. C. I. L. R., 13 Calc., 21.

(2) I. L. R., 6 Bom., 564.

(4) I. L. R., 5 Mad., 193.

(3) I. L. R., 7 Bom., 91.

(5) Printed Judgments for 1878, p. 288.

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which time the present plaintiffs, the brothers of Rághu, were minors. By the decree in that suit the plaintiff was declared to be entitled to recover the debt from the mortgaged land, and, in the event of its being insufficient, out of the estate of the defendant. In execution of this decree a part of the family property (other than the mortgaged property) was put up for sale and purchased by the defendant. The Judge held that, as the appellant No. 2 had not sued Kondia in his life-time, nor had sued Rághu as manager and representing the family, only Rághu's share passed to the defendant under his purchase.

In *Bissessur Láll Sahoo v. Máhárájáh Luchmeessur*⁽¹⁾, the debt sued on had been contracted by the deceased father, and the eldest son had been sued alone as heir of his father, as in the present case, and the Court held that under the circumstances it must be assumed that the defendant had been sued as a representative of the family, and after referring to *Ishan Chunder Mitter v. Buksh Ali Soudagur*⁽²⁾ and *The General Manager of the Ráj Durbhunga v. Máhárájáh Coomar Rámáput Sing*⁽³⁾ expressed the opinion that, in execution proceedings, the Court would look at the substance of the proceedings in determining what was sold. In the case in Marshall's Reports, Sir B. Peacock says: "If the parties, who went to that auction, had referred to the decree, they would have found that the debt, for which the sale was to take place, was not the widow's, but of the father Jugmohun's, and that the property to be sold under the decree was not the widow's, but Jugmohun's, because Jugmohun was really the debtor, and the widow was sued merely in her representative character." The Privy Council would appear to have illustrated this principle in *Mussamat Nanomi Babuasin v. Modhun Mohun*⁽⁴⁾, where *Deendyal's case*⁽⁵⁾ is explained and distinguished. There the debt was the father's debt, and the father alone was sued; and the Privy Council held that "where the facts are such that the auction-purchaser has bargained and paid for the entirety he may defend his title upon any ground which would have justified a sale if the sons had been

(1) L.R., 6 Ind. Ap., 233. (2) Marsh. Rep., 614. (3) 14 Moore's L. A., 605.

(4) L. R., 13 Ind. Ap., 1; S. C. I. L. R., 13 Calc., 21.

(5) L.R., 4 Ind. Ap., 247.

brought in to oppose the execution proceedings." Later on in the judgment they say: "The auction-purchaser must have supposed he was purchasing the entirety, and that the members of the family, who were not parties to the proceeding, can only be allowed to prove that the debt did not justify the sale."

Applying the principle to the facts of the present case, we think that, without undue refining, it is impossible to distinguish between them and those in *Bissessur Láll v. Máhárájáh Luchmeessur*⁽¹⁾. The debt was incurred by the father—the property in question had been declared liable for the debt, as in *Bissessur Láll Sahoo v. Máhárájáh Luchmeessur*⁽¹⁾—the deceased father had been made a party by his son and heir—which are the identical circumstances relied on in the case before the Privy Council. Here, moreover, the only other members of the family were minors, which strengthens the conclusion that Rághu was sued as fully representing Kondia. Looking, therefore, at the substance of the execution proceeding, the proper conclusion, we think, is that the estate in its entirety was intended to be sold. We must, therefore, reverse the decree, and send the case back for a fresh decision after a finding has been recorded on the following issue:—"Was the debt incurred for an immoral and improper purpose?" The *onus* of proof as to which lies on the plaintiffs.

Costs of this appeal to follow the result.

Decree reversed and case remanded.

(1) I.R., 6 Ind. Ap., 233.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándhár Haridás.

DINKAR SADÁSHIV, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHIKA'JI SADA'SHIV, (ORIGINAL DEFENDANT), RESPONDENT.*

Adverse possession—Joint family—Possession by one member of family—Neglect by plaintiff to take possession of his share notwithstanding request that he would do so—Limitation.

The plaintiff and the defendant were brothers and members of an undivided family. The plaintiff was in Government service, and had been for a long time

*Second Appeal, No. 727 of 1884.

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1887.

January 25.