APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

1887. *April* 20.

DÁJI HIMAT, DECEASED, BY HIS SON AND HEIR, KA'SHIBA'I, FOR HIMSELF AND AS GUARDIAN OF HIS MINOR BROTHER, NATHU, (ORIGINAL DEFENDANT), APPELLANT, *v.* DHIRAJRA'M SADA'RA'M, (ORIGINAL PLAINTIFF No. 2), RESPONDENT.*

Minor—Guardian—Representative of minor in a suit against him—Certificate—Act XX of 1864*—Joint family—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale—Limitation for such suit—Act XV of* 1877, *Sec.* 7 *and Art.* 12*—Family debt binding on minor son.*

In 1862 Rájkaran and his son Amrá mortgaged the property in dispute to Bezanji. In 1863, Rájkaran died, leaving a widow, Shivbá, and two sons, *viz.*, Amrá and Parbhu, a minor. In 1866, Amrá and Shivbá, the latter of whom acted for herself and as guardian of her minor son Parbhu, settled the account with Bezanji, the mortgagee, obtained a fresh advance, and passed a fresh mortgage-bond to him. In 1868 Amrá died. In 1869 Bezanji's assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against Shivbá both as guardian of the minor Parbhu and also against her in her individual capacity. At the Court sale held in execution of this decree, Dáji purchased the property in dispute in 1870.

In 1881 Parbhu filed the present suit to recover possession of the property, alleging that Dáji's purchase was invalid as against him, he having been a minor at the time of the Court sale. He subsequently assigned his interest to the respondent, (second plaintiff). It was contended on behalf of the defendant that the suit not having been brought within one year after Parbhu had attain*indás* was barred by limitation under article 12, Schedule II, of Act XV of 1

Held, that the suit was not barred by limitation. Parbhu h pro-perly represented by Shivbá in the suit of 1869, as she had not obta icate under the Minors' Act (XX of 1864). Parbhu was, therefore, n the decree in that suit, or by the sale in execution, and article 12 I, of Act XV of 1877 did not, apply.

Held, also, upon the merits, that the debt for which the dec ssed, being a family and ancestral debt, was binding upon the whole fa cluding the plaintiff, who was, therefore, not entitled to disturb the execution-purchaser.

THIS was a second appeal from the decree of Shripad Bábáji Thákur, Acting Assistant Judge of Broach, in Appeal No. 81 of 1882.

*Second Appeal, No. 256 of 1885.

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On the 22nd May, 1862, one Rájkaran and his son Amrá mortgaged the property in dispute to Bezanji Makáji for Rs. 299. Rájkaran died in 1863, leaving a widow, Shivbá, and two sons, the said Amrá and Parbhu, a minor. On the 23rd June, 1866, Amrá and Shivbá, the latter of whom acted for herself and as guardian of the minor Parbhu, created a further charge upon the same property. On the 3rd September, 1867, the account with the mortgagee was settled, a fresh advance of Rs. 308 was made, and a fresh mortgage-bond for Rs. 815 was passed by Amrá and Shivbá acting for herself and as guardian of Parbhu. In 1868 Amrá died. In 1869, Bezanji assigned his interest under the mortgage-bond to one Muleshvar. Muleshvar filed a suit (No. 2114 of 1869) upon the mortgage, and obtained a decree against Parbhu as heir of Amrá, deceased, and against Shivbá as guardian of Parbhu, and also against her in her personal capacity. The decree directed the mortgage-debt to be recovered by sale of the mortgaged property and also of any other property belonging to the judgment-debtors. In execution of this decree the property in dispute was attached and put up to auction. The defendant Dáji Himat purchased it for Rs. 1,550 on the 17th February, 1870. He obtained a certificate of sale, and got possession of the whole property.

In 1881 Parbhu filed the present suit to recover possession of the property, alleging that he was a minor at the time the defendant Dáji purchased the property at the Court sale, and that the defendant's purchase was invalid as against him. Pending the suit he assigned his interest to the second plaintiff (respondent).

The defendant pleaded *(inter alia)* that the suit was barred by limitation; that the decree, in execution of which the property was sold, was binding on the plaintiff; and that the debt, for which the decree was passed, was an ancestral debt which the plaintiff was bound to pay.

The Subordinate Judge held that the suit was not barred by limitation, having been brought within twelve years from the date of the sale; that the plaintiff was sufficiently represented by his mother, Shivba, in the suit of 1869; that the debt, for which the decree was passed, was an ancestral and family debt; and that,

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therefore, the plaintiff was bound by the decree and the sale. He accordingly rejected the plaintiff's claim.

In appeal, the acting Assistant Judge reversed the decree of the Subordinate Judge, on the ground that the plaintiff had not been properly represented by Shivbá in the suit of 1869, as she had not obtained a certificate under the Minors' Act (XX of 1864), and that, therefore, the plaintiff was not bound by the decree in that suit, and by the sale in execution. He accordingly awarded the plaintiff's claim.

Against this decision the defendant preferred a second appeal to the High Court.

Ráv Sáheb *V. J. Kirtikar* for the appellant:—The present is substantially a suit to set aside the Court sale at which the defendant purchased the property in dispute. The suit should, therefore, have been brought within one year after the plaintiff attained his majority. The case falls under article 12 of Schedule II of Act XV of 1877. The sale binds the plaintiff. The decree, in execution of which the sale was held, was passed in a suit to which the plaintiff was a party. He was a minor no doubt, but was effectively represented by his natural guardian. It was not necessary for the guardian to obtain a certificate under the Minors' Act—*Vijkor* v. *Jijibhái Vaji*[1]; *Shivbasápá* v. *Bhimá*[2]. The debt, for which the decree was passed, was a family and ancestral debt; the decree and the sale in execution are, therefore, binding on the plaintiff.

Gokuldás Káhándás for the respondent:—The mother of the minor had no authority to represent him and defend the suit on his behalf without a certificate under the Minors' Act XX of 1864—*Jathá Náik* v. *Venktápá*[3]; *Mrinamoyi Dabia* v. *Jogodishuri Dabia*[4]; *Doorga Persad* v. *Kesho Persad Singh*[5]. The decree in that suit does not bind the minor. The sale in execution, therefore, does not affect the minor's interests. We do not sue to set aside the sale, but to recover possession of immoveable property. The twelve-years' rule, therefore, applies to the present case.

(1) 9 Bom. H. C. Rep., p. 310.
(2) Printed Judgments for 1883, p. 173.
(3) I. L. R., 5 Bom., 14.
(4) I. L. R., 5 Calc., 450.
(5) L. R., 9 I. A., 27.

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NÁNÁBHÁI HARIDA'S, J.:—The facts of this case are briefly these: The property in dispute was, on the 22nd May, 1862, mortgaged by Rájkaran and his son Amrá to one Bezanji. Rájkaran thereafter died, leaving a widow, Bái Shivbá, and two sons, the said Amrá and the first plaintiff, Parbhu, then a minor. On the 23rd June, 1866, Amrá and Bái Shivbá acting for herself and also as guardian of her minor son Parbhu created a further charge (exhibit B) on the same property. On the 3rd September, 1867, they settled their account with the mortgagee, and obtaining a fresh advance passed a fresh mortgage-bond (exhibit C) giving additional security. Bezanji assigned his right as such mortgagee to one Muleshwar, who in Suit No. 2114 of 1869 obtained a decree (exhibit 17) against Parbhu as the deceased Amrá's heir,—Amrá having died in the meantime,—and against Bái Shivbá as the guardian of Parbhu, and also against her in her own individual capacity. The decree directed the mortgage-debt Rs. 1,149 and costs of the suit to be realized by the sale of the mortgaged property and also from defendant's other property. In execution of this decree the property in dispute was sold and purchased by the defendant Dáji Himat for Rs. 1,550 on the 17th February, 1870. In June, 1881, or more than eleven years after, but within twelve years of such sale, Parbhu brought this suit to recover possession of such property, ignoring altogether the mortgage transactions and the decree, and alleging that the defendant had taken wrongful possession of it in 1870 whilst he was a minor. He also alleged that he had attained his majority only a year before. It is, however, found that he was "at least twenty-five years old when he instituted his suit."

The Subordinate Judge rejected his claim with costs, and this is an appeal to us against the Assistant Judge's decision reversing that decree. In the course of the argument we intimated our opinion that neither the mortgage nor the sale in execution was contrary to the provisions of the Bhágdári Act (V of 1862, Bombay), the whole of the *bhág* having formed the subject of both, as found by the lower Courts.

The only questions, therefore, which we have now to determine, are, first, whether the suit is barred by limitation, and, secondly, if

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not, whether the plaintiff is entitled to the relief he seeks, or any other?

Upon the first point it was urged that under Act XV of 1877, sec. 7 and Schedule II, article 12, the plaintiff ought to have sued within one year of his attaining majority. Whether he ought to have done so must, we think, depend upon whether he was properly represented in the suit of Muleshwar. We are of opinion he was not so represented. His mother, Bái Shivbá, was not authorized to represent him, not having obtained a certificate under the Minors' Act (XX of 1864)—*Jathá Náik* v. *Venkatápá*[1]; *Mrinamoyi Dabia* v. *Jogodishuri Dabia*[2]; *Doorga Persad* v. *Kesho Persad Singh*[3]. His suit, therefore, was not barred under that article—*Vishnu Keshav* v. *Rámchandra Bhúskar*[4].

Now, as to the merits. As he was not properly represented in the above suit, the decree in it does not bind him, and it is open to him now to show, if he can, that the debt, for which that decree was passed, and to realize which the property in dispute was sold in execution, was such as did not bind him—*Mussamut Nunomi Babuasin* v. *Modun Mohun*[5]; *Jairám Bajabáshet* v. *Jomá*[6]. But he does not even allege any such thing in this suit. The Subordinate Judge has distinctly found that the debt due to Bezanji was an ancestral and a family debt, and, therefore, one binding upon the whole family, the plaintiff included. Neither in the appeal to the Assistant Judge nor here has this finding been questioned. There is no ground to impute any fraud to his mother, who is still living with him, and who would have been called to prove, if such was the fact, that the debt was not such as to justify the sale. And his silence for nine years after he had attained his majority shows what view he himself took of the nature of that debt. The family has benefited to the full extent of the purchase-money paid by the defendant. Such being the case, we think he has entirely failed in establishing his title to disturb the execution-purchaser.

The respondent (second plaintiff) being only his assignee pending the suit stands in no better position. We must, accordingly,

(1) I. L. R., 5 Bom., 14.
(2) I. L. R., 5 Calc., 450.
(3) L. R., 9 I. A., 27.
(4) I. L. R., 11 Bom., 130.
(5) L. R., 13 I. A., 1.
(6) Printed Judgments for 1886, p. 282.

reverse the decree of the Assistant Judge, and confirm that of the Subordinate Judge. The respondent to pay the appellant's costs both in this and in the lower Appellate Court.

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Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

NA'RA'YAN CHITNO JUVEKAR, (ORIGINAL DEFENDANT), APPELLANT, *v.* VITHUL PARSHOTAM, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *April* 25.

Decree—Execution—Decree specifying a certain time for execution—Construction—Condition precedent—Limitation.

The plaintiff obtained a decree on the 25th July, 1882, which directed that he should give the defendant possession of certain parcels of land at the end of next *Márgashirsha* (*i.e.*, 9th January, 1883,) and that, on his doing so, the defendant should remove certain hedges and sheds, and restore the land in suit to the plaintiff. On the 9th December, 1885, the plaintiff applied to execute the decree. The defendant resisted the application as being time-barred. He contended that the plaintiff, having failed to deliver up the land in his possession within the time specified in the decree, he had lost his right to execute the decree.

Held, that the application was not time-barred. The specification of the end of *Márgashirsh* had merely the effect of postponing the operation of the decree till that time, and the plaintiff had three years from that date within which he might seek execution.

The mention of a term when a particular right is to become enforceable, is not a condition precedent, whether the enforcement be otherwise subject to a condition or not.

SECOND appeal from the order of H. J. Parsons, District Judge of Thána, confirming the order of the Subordinate Judge of Panvel in *darkhást* No. 2153 of 1885.

The plaintiff obtained a decree, dated 25th July, 1882, which was to this effect: "The plaintiff should give the defendant possession of certain land at the end of next *Márgashirsha* (*i.e.*, 9th January, 1883); on his so doing, the defendant should remove the hedges and cowshed, and make over the land in suit to the plaintiff." On the 9th December, 1885, the plaintiff made

* Second Appeal, No. 523 of 1886.