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to be received through the Collector, or recovered from persons bound to pay revenue; adding that the decision in *Vásudev* v. *The Collector of Ratnágiri*(1) is in accordance with this view. In *Bábáji* v. *Rájárám*(2), this Court, in construing section 4, did not narrow the ordinary grammatical meaning of that section so as to exclude suits between private persons.

We are of opinion that the present claim comes within the Pensions Act, 1871; but as the plaintiff succeeded in the original Court, where the objection of the want of the certificate was not taken, and as the certificate has been produced here, we reverse the decree of the District Court and remand the appeal for trial on the merits. The appellant to pay the costs in this Court; other costs to be costs in the cause.

Decree reversed.

(1) I. L. R., 2 Bom., 99 : S. C. L. R., 4 I. A., 119.

(2) I. L. R., 1 Bom., 75, at p. 79.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891. *September* 28.

BA'BU MÁDHAV SHÁNBHOG, (ORIGINAL DEFENDANT No. 4), APPELLANT, *v.* VENKATESH MANJÁYA AND OTHERS, (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Practice—Finding of the Court of first instance—Contrary conclusion by the District Judge without discussion of the grounds—Reversal of the decree—Rehearing.

The District Judge having expressed an opinion, and recorded a finding, without discussing the several grounds on which the Subordinate Judge came to a contrary conclusion,

Held, that the finding of the District Judge ought not to be accepted.

THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Kánara.

Suit for partition.

The plaintiff, Venkátesh Manjáya, alleged in the plaint that he and defendants Nos. 1 and 2, Náráyan Manjáya and Upendra Manjáya, were brothers, defendant No. 1 being the step-brother

*Second Appeal, No. 576 of 1890.

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of plaintiff and defendant No. 2; that after the death of their father Manjáya, which took place in 1867, the plaintiff and defendant No. 2 separated from defendant No. 1, and got their shares of the moveable property; that the immoveable property was left undivided, and the income thereof was enjoyed by the three brothers according to their shares; that the plaintiff and defendant No. 2 were minors at the time of their father's death that, after attaining majority in the year 1886, the plaintiff demanded his share of the lands from defendant No. 1, who failed to comply with the plaintiff's demand; that defendant No. 1 had alienated certain lands to defendant No. 4, Bábu Mádhav Shánbhog, defendant No. 6, Náráyan Anant Shánbhog, and to others (who were joined as co-defendants Nos. 3, 5, 7, 8 and 14, and were subsequently dismissed from the suit on plaintiff's application), and that the alienations were not binding on the plaintiff. The plaintiff, therefore, claimed separate possession of one-third share of all the properties mentioned in the plaint. The suit was filed in the year 1888.

While the suit was pending in the Court of first instance the plaintiff and defendants Nos. 1, 2, 9, 10, 11, 12 and 13 presented a *rajináma* and three lists whereby they agreed that plaintiff should take possession of the property mentioned in one of the lists, defendant No. 1 should take possession of the property mentioned in another list, and defendant No. 2 should take possession of the property mentioned in the third list, subject to certain conditions in favour of the defendants.

The suit, therefore, proceeded against defendants Nos. 4 and 6 alone.

Defendant No. 4, Bábu Mádhav Shánbhog, contended that serial Nos. 128 to 140 and 142 to 144 had been in the possession and management of defendant No. 1, with other lands; that the said serial numbers had been lying uncultivated, and defendant No. 1 had to pay Government assessment from his own pocket, and that, as he was going to relinquish those lands to Government, this defendant purchased them from him in the year 1879; that the plaintiff brought the suit in collusion with defendant No. 1, and that the claim was time-barred.

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Defendant No. 6, Náráyan Anant Shánbhog, answered that the plaintiff, defendant No. 1 and defendant No. 2 were divided; that he and defendant No. 12 had purchased serial No. 146 from defendant No. 1; that defendant No. 1 had relinquished serial No. 145 to the Government, from whom it was taken by this defendant.

The Subordinate Judge (Ráo Sáheb N. B. Muzumdár) found that the claim was not time-barred; that the alienation of Survey No. 146 was not, but that the other alienations were, binding on the plaintiff.

In his judgment the Subordinate Judge made the following observations:—

"It is admitted by the plaintiff and defendants Nos. 1 and 2 that the family lands were undivided, and that only the produce was divided and enjoyed by them—exhibits 88, 104 and 107. Defendant No. 1 is the eldest of the three brothers, and was the natural manager of the family. After the division of the moveable property he was a trustee for the plaintiff and defendant No. 2, if not the manager according to Hindu law. It cannot, therefore, be said that he had no power whatever to deal with the property under any circumstances. If defendant No. 1 was not trustee, he and defendant No. 4 were in adverse possession.

"It appears from exhibits 87, 88, 103 and 132 that serial Nos. 128 to 146 formed only small portions of Kágal Gazni lands. These all belonged to different owners, and owing to want of union between them they were not repaired every year, as marshy lands are always required to be, and were damaged by salt water, and consequently left uncultivated for some years. The *khata* of the lands in dispute was in the name of defendant No. 1, and their possession was with defendant No. 1 or nobody. Defendant No. 1 had to pay the assessment without obtaining any profit from the lands, and thought of relinquishing them to Government. Defendant No. 9 was also about to relinquish certain lands of his own for the same reason. Defendant No. 4 offered to purchase these lands from defendants Nos. 1 and 9, and the deed of sale, exhibit 136, was passed to him by both. The fact that these and other adjacent lands forming part of Kágal Gazni

lands were only fit to be relinquished, and were either relinquished by different owners and then taken from Government by defendant No. 4, or sold to defendant No. 4, who offered to purchase them, is proved by the witnesses, exhibits 87, 88, 103 and 132; by *rajinámas* and *kabuláyats* passed to Government, being exhibits 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 80, 81, 82; and also by the deeds of sale, exhibits 137, 138, 139 and 140. It also appears that defendant No. 4 got *mulgeni* leases from other owners who did not like to relinquish or sell their lands. The receipts, exhibits 141, 142, 143, 144 and 145 further show that although the mother of plaintiff and defendant No. 2 paid their share of Government assessment to defendant No. 1 every year, she did not pay the assessment of the Kágal lands to him.

"Under these circumstances I consider the sale by defendant No. 1 to defendant No. 4 of the serial Nos. 128 to 140 and 142 to 144 was not only justifiable, but necessary. It appears to me that there was acquiescence, though not express consent, on the part of the plaintiff's mother, and subsequently on the part of the plaintiff and defendant No. 2 themselves, in the matter of the sale."

Against the decree of the Subordinate Judge the plaintiff and defendant No. 2 appealed to the District Court, which modified the decree, and directed that plaintiff and defendant No. 2 should each obtain, by *saras-niras* partition, a one-third share in the lands alienated by defendant No. 1 to defendants Nos. 4 and 6.

The District Judge in his judgment remarked:—

"It is an established fact that the family of plaintiff and defendants No. 1 and 2 became separate in food and residence, but continued to hold the land in common, dividing the income according to their proper shares. It appears that the defendant No. 1 has been quietly alienating the estate. The question is, had he any authority to do so? The Subordinate Judge regards him in the light of a manager, but thinks he may have been a trustee. Undoubtedly he was a trustee, and, as such, incompetent to alienate the shares of the plaintiff and defendant No. 2, who were minors. Even if he be regarded as manager, he has failed to show that there was any pressing necessity to alienate

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permanently the lands to defendants Nos. 4 and 6. It was his duty to deal with the estate as a whole, and not piecemeal."

Against the decree of the District Court, defendant No. 4, appealed to the High Court.

Ghanashám Nilkanth Nádkarni for the appellant:—The ruling in *Krishnáji Lakshman* v. *Sitárám Murarráv*[1] shows that a mortgagee is not responsible for any act which the mortgagor may have done after the mortgage. Similarly, we contend that, if any compromise be effected by co-sharers after the sale, we cannot be affected by such a compromise, and the property, which we have purchased, cannot suffer on account thereof.

Defendant No. 1, Náráyan Manjáya, occupied the position of a manager of joint family property, and, as such, was competent to deal with it for the benefit of all the co-sharers. As manager he would be justified in using his discretion as to the best mode of dealing with the property, whether as a whole or piecemeal, and would be entitled to reasonable latitude in the exercise of such discretion. The Subordinate Judge has referred to the evidence in the case, and has given his reason for his finding that the sale was binding on the plaintiff. The Subordinate Judge has also remarked that there was acquiescence on the part of the plaintiff and defendant No 2, Upendra Manjáya. The lower Court merely says that we failed to show that there was any pressing necessity to alienate the lands permanently; but the evidence referred to by the Subordinate Judge, and the reasons given, do show that defendant No. 1 was justified in alienating the lands. The District Judge has neither referred to that evidence, nor has he considered those reasons.

Náráyan Ganesh Chandávarkar for the respondents:—Though there was no division by actual metes and bounds, still the plaint distinctly states that there was division, and that the members divided the income of the property according to their shares. They were, therefore, tenants in common, and each of them had a share in every parcel of the land. The lower Court was, therefore, right in modifying the decree of the Subordinate Judge.

(1) I. L. R., 5 Bom., 496.

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SARGENT, C. J.:—We do not think we ought to accept the District Judge's finding on the question whether defendant No. 1 was justified by urgent necessity in selling the land in question to defendant No. 4, as he has expressed an opinion without discussing at all the several grounds on which the Subordinate Judge came to a contrary conclusion. We must, therefore, reverse the decree and send back the case for decision after recording a fresh finding on the issue raised by the District Judge. Even, in the event of the issue being found in the negative, the defendant No. 4 will still be entitled to the fields which he purchased from defendant No. 1, if, on partition of all the family lands mentioned in the plaint, they can possibly be allotted to the share of defendant No. 1, on the principle laid down in *Udávám* v. *Ránu* (1), *Náráyan* v. *Mahadu* (2) and *Mahábalaya* v. *Timáya*(3).

Costs to abide the result.

Decree reversed.

(1) 11 Bom. H. C. Rep., 76. (2) P. J., 1889, p. 94.

(3) 12 Bom. H. C. Rep., 138.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

RA'MKOR GOPA'LJI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGA'RA'M, VALAD KUSHA'BA, (ORIGINAL DEFENDANT), RESPONDENT.*

1891. *September* 30.

Practice—Issues—Rent-note—Litigation before Subordinate Judge on the ground of ownership as well as rent-note—Omission by Appellate Court to decide on the question of ownership—Reversal of decree.

Where it appeared that an issue was raised as to ownership, and that both parties at the trial before the Subordinate Judge gave evidence on such issue (although the claim was based, in the main, on a rent-note), and the lower Appellate Court declined to find on such issue,

Held, reversing the decree of the lower Appellate Court, that it ought to have found on the issue.

THIS was a second appeal from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Dhulia with appellate powers.

* Second Appeal, No. 538 of 1890.