APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

1897.
July 27.

BALA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BALAJI MARTAND (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Joint family—Ancestral property—Mortgage by father and one of the sons—Agreement by father alone that mortgagee should enjoy the property for a term of years in satisfaction of debt—Agreement not binding on sons—Alienation—Decree against father—When binding on his sons—Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 44 and Sec. 15A.

In 1888 one Dhondi and his eldest son Bala mortgaged certain ancestral property for Rs. 1,500. In 1890 Dhondi alone came to an arrangement with the mortgagee by which it was agreed that the mortgagee should enjoy the income of the mortgaged property till 1900 A.D. in full satisfaction of the mortgage-debt. This agreement was filed in Court under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) on 4th April, 1891, when it took effect as a decree.

In execution of this decree the mortgagee sought to attach the property mortgaged. Dhondi having died in the meantime, his sons objected to the attachment on the ground that the decree was fraudulent and collusive. But this objection was disallowed by the Court, and the property was attached. Thereupon Dhondi's sons filed a suit for redemption of the mortgage of 1888.

Defendant pleaded that the mortgage was merged in the agreement of 1890, and that the plaintiffs had no right to redeem.

Held, that the agreement was not binding upon the plaintiffs. By the agreement the right to redeem the mortgage before its fixed period under the provisions of section 15A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) ceased, and the right to the surplus profits in the hands of the mortgagee over and above the mortgage-debt was also lost, without any countervailing advantage or benefit. Such an agreement by a Hindu father is not binding on his sons in respect of ancestral property. It amounts *pro tanto* to an alienation, by him, of the ancestral estate without consideration.

Held, also, that as the agreement was not binding upon the plaintiffs, the decree against their father based upon the agreement was also not binding upon them.

SECOND appeal from the decision of Ráo Bahádur Thakurdas M., Additional First Class Subordinate Judge, A. P., of Poona.

Suit for redemption. The mortgaged property was a *mokása* allowance of Rs. 412 annually received from the Government trea-

*Second Appeal, No. 274 of 1897.

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sury at Bhimthadi in the Poona District. It was the ancestral property of one Dhondi and his sons Bala, Aba, Gangaram, and Bapu, a minor.

On the 28th June, 1888, Dhondi and his eldest son Bala mortgaged the *mokása* allowance to the defendant to secure the repayment of Rs. 1,500 with interest at 18 per cent. per annum; the mortgage to be redeemable in the year 1900 A.D. on taking accounts in the usual manner.

On the 28th April, 1890, Dhondi came to an arrangement with defendant (mortgagee), by which it was agreed that the defendant should enjoy the allowance till A.D. 1900 in full satisfaction of the mortgage-debt.

This agreement was made before the village conciliator, and was forwarded by him to the Subordinate Judge of Bhimthadi, who ordered it to be filed in the Court under section 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) on the 4th April, 1891, when it took effect as a decree of the Court.

Dhondi having died, the defendant applied for execution of the decree against Dhondi's sons and legal representatives Bala, Aba, Gangaram, and Bapu, a minor.

Bala resisted this application on the ground that the decree was fraudulent and collusive and, therefore, not binding on Dhondi's sons. The Subordinate Judge overruled this objection and passed an order for attachment of the *mokása* allowance.

Thereupon Bala filed the present suit in 1894 for redemption of the mortgage of 1888, alleging that the mortgage-debt had been satisfied. Bala's brothers were made co-plaintiffs after the institution of the suit.

The defendant pleaded (*inter alia*) that the plaintiffs had no right to redeem; that the mortgage was merged in the consent decree passed between him and the deceased Dhondi in 1891; that all objections taken to the decree by the plaintiffs having been overruled by the Court in the execution proceedings, the plaintiffs were bound by the decree; and that the suit was barred under section 13 of the Code of Civil Procedure (Act XIV of 1882).

The Court of first instance rejected the plaintiff's claim, holding that the mortgage was no longer subsisting, having been super-

seded by the consent decree between the deceased Dhondi and the mortgagee, and that the decree was binding on the plaintiffs as sons and heirs of Dhondi.

This decision was upheld, in appeal, by the First Class Subordinate Judge with appellate powers. He held that the agreement and the decree made thereon were binding on the plaintiffs; that the mortgage was merged in the decree (*Navlu* v. *Raghu*[1]); and that the plaintiffs' claim was barred by section 13 of the Civil Procedure Code, they being the legal representatives of Dhondi. (He cited, on that point, *Nimba* v. *Sitaram*[2].)

Against this decision the plaintiffs appealed to the High Court.

Ganpat Sadashiv Rao for the appellants (plaintiffs):—Dhondi had no power to deal with joint ancestral property so as to bind his sons, except with their consent or for their benefit. The consent decree between Dhondi and the mortgagee cannot bind the plaintiffs, who were not parties to it. It was, moreover, made in fraud of their rights. It deprives them of their right of redemption. It puts the mortgagee in absolute enjoyment of the property without any liability to account. Though the mortgage-debt has been more than paid off, the plaintiffs cannot under the decree recover the surplus profits in the hands of the mortgagee. Such an arrangement is against the interests of the sons and is beyond the authority of the father. A Hindu father ordinarily represents the family in litigation as well as in other transactions, and a decree obtained against him as manager would, no doubt, bind the family. But the decree must be obtained in *bonâ fide* litigation. A consent decree does not stand on the same footing—*Assamathem* v. *Roy Lutchmeeput*[3]. And no effect can be given to such a decree when it is manifestly injurious to the interests of the sons.

There was no appearance for the respondent.

FARRAN, C. J.:—This was a suit filed by Bala to redeem a mortgage which he and his late father Dhondi executed on the 28th June, 1888, in favour of the defendant to secure payment of the sum of Rs. 1,500 with interest thereon at the rate of Rs. 18 per cent. per annum redeemable in Shake 1822 on making up ac-

(1) I. L. R., 8 Bom., 303. (2) I. L. R., 9 Bom., 458.

(3) I. L. R., 4 Cal., 142.

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counts in the usual way. The mortgaged property consisted of a *mokása* (family) allowance of Rs. 412 per annum payable at the Mámlatdár's treasury at Bhimthadi and was ancestral estate. Dhondi and his sons were agriculturists. The brothers of the plaintiff Bala were subsequently made parties plaintiffs to the suit.

The defendant pleaded (*inter alia*) that the father Dhondi in his lifetime on the 28th April, 1800, had come to an agreement with the defendant before the conciliator of mauje Muram whereby it was arranged that the mortgagee was to enjoy the allowance up to the said Shake year 1822 in full satisfaction of the mortgage-debt. This agreement, which was come to under section 43 of the Dekkhan Agriculturists' Relief Act, 1879, was filed in Court under section 44 of the same Act and thereupon took effect as a decree. Neither Bala nor his brothers were made parties to these proceedings. The lower Courts have held that the mortgage of 1888 became merged in the decree, and that the plaintiffs are bound by the decree as though they had been parties to the proceedings under the Dekkhan Agriculturists' Relief Act. The plaintiffs have appealed, and the question which we have to determine is whether the above ruling is correct. The respondent has not appeared in support of the decision of the lower Courts. So we have heard no argument on his side of the question.

As a Hindu father's powers in respect of ancestral property, though in some respects peculiar when compared with the powers of other Hindu managers, are still of a limited character, we must consider the operation and effect of the agreement of 1890 upon the mortgage of 1888 before determining how far Dhondi's sons are bound by it and by the decree passed thereon; for it must be borne in mind that the sons of Dhondi were co-parceners with their father when the agreement was entered into, and that as such co-parceners, and not as the legal representatives of Dhondi, they are now seeking to redeem.

Under the mortgage of 1888 the plaintiffs and their father were entitled to an account and under the provisions of section 15 A of the Relief Act were entitled to redeem though the fixed

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period of the mortgage had not expired; and the Court was also in a redemption suit entitled to reduce the rate of interest stipulated for in the mortgage if it were deemed exorbitant or excessive. A simple calculation shows that even allowing interest at 18 per cent. per annum the *mokása* allowance received by the defendant mortgagee would have paid the mortgage-debt and interest in between seven and eight years. A large surplus would thus have been due to the mortgagors at the end of the mortgage term. By the agreement which Dhondi entered into, when it under section 14 of the Relief Act obtained the force of a decree, the right to redeem the mortgage before its fixed period ceased, and the right to the surplus of the *mokása* over and above the mortgage-debt and interest was lost.

The net result was that the father by the agreement gave up the right of the family to receive the sum of Rs. 1,800 or thereabout, without any countervailing advantage or benefit. Such an agreement by a Hindu father is not, in my opinion, binding upon his sons in respect of ancestral property. It amounts *pro tanto* to an alienation by him of the ancestral estate without consideration. See upon this point Mayne's Hindu Law, pl. 311, and the cases referred to by the learned author.

It remains to consider whether the filing of such an agreement, operating as a decree under section 44 is a decree binding upon Bala and his brothers, who were not parties to the proceedings. No case, that I am aware of, has gone as far as that. In the first place, it was a decree founded upon consent, and the Courts draw a clear distinction between adverse decrees obtained in regular course and consent decrees in so far as the interest of third persons not parties to the proceedings is concerned. An example will be found in *Assamathem* v. *Roy Lutchmeeput*[1]. Besides, if the agreement of Dhondi was not one binding upon his sons, he would not properly represent his sons in a suit filed to enforce it. When the transaction is one by which the sons are bound, then a decree based upon such a transaction is binding upon them even though they are not parties to it. Most of the authorities upon this subject will be found collected in *Davalava* v. *Bhimaji*[2]. But when the original transaction is not binding upon the

(1) I. L. R., 4 Cal., 142. (2) I. L. R., 20 Bom., 338.

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sons, then the decree against their father based upon such a transaction is not binding upon them when they are not parties to the suit in which it is passed. For example, a decree against a father in a suit by a purchaser to recover possession of ancestral estate voluntarily alienated by the former is not binding upon the sons not made parties to the suit, and so even if it is an alienation by the father for debts of an illegal or immoral character which the sons are not liable to pay—*Mussamut Nanomi* v. *Modun Mohun*[1]; *Daulat Ram* v. *Mehr Chand*[2]. The present case appears to me to fall within the analogy of these decisions. In the case of *Davalava* v. *Bhimaji*[3] the original transaction was clearly binding upon all the heirs of Nur Mahomed. The case of the plaintiff Bala is even stronger than that of his brothers, as he was one of the co-mortgagors in 1888 and was not made a party to the proceedings in which the terms of the mortgage which he had executed were altered to his prejudice.

On the whole, I am of opinion that the fetter upon redemption imposed by the proceedings of 1890 upon the father of the plaintiffs is not binding upon them as co-parceners even though it acquired under section 44 of the Relief Act the force of a decree against Dhondi himself and his sons as his legal representatives. I notice that the execution proceedings which were relied upon as a bar to the present suit were resisted by the plaintiff Bala in his latter capacity and are not, therefore, available as a defence to this suit.

I would reverse the decrees of the lower Courts and remand the suit to have the mortgage-account taken by the Subordinate Judge. The respondent must pay the costs of the appeals in this and the lower appellate Court. Costs already incurred in the first Court to be costs in the cause.

CANDY, J.:—I concur, and for the same reasons. I would merely add that it would indeed be unfortunate if we felt bound to hold that the inequitable arrangement, entered into between Dhondi and defendant in 1890, bound Bala and his brothers. It was, on the face of it, in fraud of Dhondi's sons and co-parceners. This case shows how necessary it was by Act VI of 1895, section 12,

(1) L. R., 13 I. A., 1. (2) L. R., 14 I. A., 187.
(3) I. L. R., 20 Bom., 338.

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to substitute the present provisions of section 44 of the Dekkhan Agriculturists' Relief Act for the same section as it stood previously to 1895. Such a case as the present could not have occurred had the present provisions of section 44 been in force. The Subordinate Judge would at once have seen, on a scrutiny of the agreement, that Bala, who had joined in the original mortgage, was not a party to the agreement.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Candy.

KASHINATH DADA SHIMPI (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARAYAN VALAD BAPU SHIMPI (ORIGINAL DEFENDANT), RESPONDENT.* 1897. *July* 29.

Easement—Easements Act (V of 1882), Sec. 28, Cl. (d)—Right to discharge smoke over a neighbour's land—Acquisition of right by prescription.

A right to discharge smoke over adjoining land can be acquired by prescription. The definition of easement in the Easements Act (V of 1882) is wide enough to embrace such an easement, and section 28, clause (*d*), expressly recognizes the right to pollute air as a right capable of being acquired by prescription.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, First Class Subordinate Judge of Násik with appellate powers, confirming the decree of Ráo Sáheb G. N. Kelkar, Subordinate Judge of Yeola.

Suit for a declaration that the plaintiff was entitled to have the smoke from his house discharged through certain smoke holes in the east wall of his house over the defendant's land and to restrain the defendant from building on his land so as to interfere with the plaintiff's right.

The Subordinate Judge held (*inter alia*) that no one had a right to send smoke issuing from his house over the land of another. He dismissed the suit.

On appeal by the plaintiff the Judge confirmed the decree.

The plaintiff preferred a second appeal.

Mahadeo V. Bhat for the appellant (plaintiff):—The lower Courts have held that such an easement as the plaintiff claims cannot be recognized at all. That is not correct—Easements Act

* Second Appeal, No. 375 of 1897.