APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Hosking.

GENU AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2 AND 3), APPELLANTS, *v.* SAKHARAM AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 1), RESPONDENTS.* 1896. *July* 3.

Land Revenue Code (Bombay Act V of 1879), Sec. 182(1)—Civil Procedure Code (Act XIV of 1882), Secs. 244, 294—Mortgage with possession—Default by mortgagee in payment of assessment—Sale for arrears of revenue—Certified purchasers—Purchase for mortgagee—Purchasers or mortgagee trustees for mortgagor—Suit by mortgagor for redemption—Execution—Sale in execution—Purchase by judgment-creditor without leave of Court—Remedy of judgment-debtor.

In 1872 the plaintiffs' father mortgaged three plots of land (Nos. 303, 304 and 305) to the first defendant with possession. In 1880 and 1881 the first defendant having made default in paying the assessment, plots Nos. 303 and 305 were sold by the Revenue authorities and were bought respectively by defendants Nos. 2 and 3. In the latter year (1881) plot No. 304 was sold in execution of a money decree obtained by the mortgagee (defendant No. 1) against the mortgagor and was purchased by his (the first defendant's) undivided brother without leave of the Court. In 1892 the plaintiffs (heirs of the mortgagor) brought this suit against defendants Nos. 1, 2 and 3 to redeem the said three plots of land from the mortgage of 1872.

Defendant No. 1 pleaded that he had inherited plot No. 304 from his brother, who had become the owner of plot No. 304 by his purchase at the execution sale in 1881. He disclaimed all interest in plots Nos. 303 and 305. Defendants Nos. 2 and 3 answered that they had become absolute owners by the purchase at the revenue sales. As to these latter, it was alleged that defendants Nos. 2 and were in possession of the said two plots for the first defendant. Defendants Nos. 2 and 3 contended that by section 182 of the Land Revenue Code (Bombay Act V of 1879) the plaintiffs were precluded from raising this point.

Held, that though section 182 forbade the Court to entertain a suit against defendants Nos. 2 and 3 on the ground that they had bought the land for defendant No. 1, it did not debar it from entertaining a suit against them on the ground that subsequently to the sale they were holding on behalf of defendant No. 1 or against defendant No. 1 on the ground that he was himself really in

* Second Appeals, Nos. 892 and 944 of 1895.

ection 182 of the Land Revenue Code (Bombay Act V of 1879):—

The certificate shall state the name of the person declared at the time the actual purchaser; and any suit brought in a civil Court against the aser on the ground that the purchase was made on behalf of another certified purchaser, though by agreement the name of the certi- used, shall be dismissed."

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possession through defendants Nos. 2 and 3 as his agents or tenants. The same principle of equity which would make defendant No. 1 a trustee for the mortgagors if he had bought in his own name, would make defendants Nos. 2 and 3 trustees for them if subsequently to the sale they held the land on behalf of defendant No. 1 and would also make defendant No. 1 himself a trustee if subsequently to the sale the property came into his possession as beneficially entitled thereto owing to an agreement between him and the certified purchasers.

Where a judgment creditor without leave of the Court buys the property of his judgment-debtor at a Court sale, the remedy of the latter is by application under section 294 of the Civil Procedure Code (Act XIV of 1882) and not by separate suit.

SECOND appeal from the decision of Rão Bahádur N. G. Phadke, Joint First Class Subordinate Judge of Sholápur, A. P.

Suit for redemption of certain plots of land (Survey Nos. 303, 304, 305) which had been mortgaged to defendant No. 1 (Motiram Fulchand) on 11th March, 1872, by the plaintiffs' father.

Defendant No. 1 alleged that as to plot No. 304, it had been purchased by his brother at a sale held in execution of a decree obtained against the mortgagor; that his brother was dead and that he had inherited plot 304 from him. He disclaimed all interest in plots No. 303 and 305.

As to plot No. 303, defendant No. 2 alleged that he had purchased it at a revenue sale in 1880 held in consequence of the mortgagee's default in paying assessment.

As to plot No. 305, defendant No. 3 claimed also as a purchaser at a revenue sale held in 1881.

The first Court held that defendants Nos. 2 and 3 had become full owners of plots Nos. 303 and 305, and as to them rejected the plaintiffs' claim, but as to plot No. 304 he passed a decree for the plaintiffs.

The plaintiffs appealed and the defendants filed cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

The appellate Court raised a further issue (No. 7) as follows:—

"(7) Are Survey Nos. 303 and 305 purchased by defendants Nos. 2 and 3 for the defendant No. 1?"

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The Judge (First Class Subordinate Judge, A. P.) found that defendants Nos. 2 and 3 had purchased these plots of lands for defendant No. 1 and allowed the plaintiffs' claim as to them. He rejected the claim as to plot No. 304, holding that as to it no suit would lie, the plaintiffs' remedy being in execution or by an application to set aside the sale under section 294 of the Civil Procedure Code.

From his decision defendants Nos. 2 and 3 filed a second appeal (No. 892 of 1895).

One of the plaintiffs also filed a second appeal (No. 944 of 1895).

Mahadeo B. Chaubal for appellants in Appeal No. 892 (defendants Nos. 2 and 3):—We purchased the lands at the revenue sales, and sale certificates were granted to us. We thus became certified purchasers and no suit could lie against us on the ground that we purchased the lands for defendant No. 1. Section 182 of the Land Revenue Code (Bombay Act V of 1879) is quite clear on the point—*Balkrishna* v. *Madhavrav*(1). Further, there is absolutely no evidence to support the finding that our purchase was for defendant No. 1. We contend that we purchased the lands in our own right and have become full owners.

Gangaram B. Rele, for the appellant (plaintiff No. 3) in Appeal No. 944 of 1895:—Our appeal relates to Survey No. 304 only. We contend that as the property was purchased at a Court sale by the undivided brother of defendant No. 1 without the sanction of the Court, it was a purchase by the defendant himself (the mortgagee) without sanction. The Court sale was, therefore, voidable, and a suit to set aside such a sale can be brought within twelve years from the date of the sale—*Erava* v. *Sidramappa*(2).

FULTON, J.:—The plaintiffs sued to redeem three fields, Survey Nos. 303, 304 and 305, which had been mortgaged to the first defendant with possession. The lower appellate Court held that they were entitled to recover Nos. 303 and 305, but not No. 304, their right to which had been extinguished by a Court sale, which took place in 1881.

(1) I. L. R., 5 Bom., 73. (2) I. L. R., 21 Bom., 424.

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In regard to Nos. 303 and 305 the appellate Court found that in 1880 or 1881 the occupancy right in the two numbers had been sold by the Collector in consequence of the default of defendant No. 1, who was bound to pay the assessment; that defendants Nos. 2 and 3 bought these numbers at the sale for defendant No. 1; and that there was none of the mortgage-debt remaining due on these numbers.

The defendants Nos. 2 and 3 have appealed, and it has been contended on their behalf that having regard to section 182 of the Land Revenue Code, the allegation that they bought for defendant No. 1 cannot be put forward, and that the finding is not supported by the evidence and should not have been arrived at, having regard to the issues tried by the Second Class Subordinate Judge. It was also urged that the fields were not free from the mortgage-debt.

On the first of these points we are of opinion that although section 182 of the Land Revenue Code does prevent the plaintiffs from proving that defendants Nos. 2 and 3 purchased on behalf of defendant No. 1, it does not determine the subsequent position of the parties. The section is as follows :—

"The certificate shall state the name of the person declared at the time of sale to be the actual purchaser; and any suit brought in a civil Court against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed."

The section is very similar to the first clause of section 317 of the Civil Procedure Code, but does not contain a proviso like the second clause. Hence it may be contended that the decisions under this section, which have been cited in *Subha Bibi* v. *Hara Lal Das*[1], are no guide to the construction of the section under consideration. It seems to us, however, that the same principles of equity which would make the first defendant a trustee for the mortgagors if he had bought in his own name (see *Balkrishna* v. *Madhavrav*[2]) would render defendants Nos. 2 and 3 trustees for them if subsequently to the sale they held the land on behalf of defendant No. 1, and would also make defendant No. 1 himself a trustee if

(1) I. L. R., 21 Calc., 519. (2) I. L. R., 5 Bom., 73 at p. 76.

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subsequently to the sale the property came into his possession as beneficially entitled thereto owing to an agreement between him and the certified purchasers. The section apparently forbids the Court to entertain a suit against defendants Nos. 2 and 3 on the ground that they bought for defendant No. 1, but does not debar it from entertaining a suit against them on the ground that subsequently to the sale they were holding the land on behalf of defendant No. 1 or against No. 1 on the ground that he was himself really in possession through defendants Nos. 2 and 3 as his agents or tenants. If it were otherwise, it would be open to a mortgagee, who was bound to pay the revenue and had been entered in the revenue books as occupant, to perpetrate a fraud by allowing the occupancy to be sold for default of payment of assessment (of which sale the mortgagor might under the circumstances have no notice) and getting it bought in by his servant or friend, who might then either continue to hold it on behalf of the mortgagee or at once make it over to the mortgagee's possession. But the principle of equity is, that if subsequently to the valid transfer of an estate (whether by the sale in England of the legal estate without notice of an equitable incumbrance, or by the sale in this country of the occupancy to realize the paramount charge of land revenue) it again becomes vested in the person whose conscience is charged by the meditated fraud, the original equity attaches to it in his hands or in that of his agents. (See Kerr on Frauds, p. 356; Story on Equity Jurisprudence, section 410; and *Kennedy* v. *Daly* [1]). This principle is clearly laid down in *Balkrishna* v. *Madhavrav*, in regard to which case it must be noted that Sir M. Westropp's allusion to the Land Revenue Code was made not with a view to limiting the applicability of the equitable principle to revenue sales prior to the enactment of the Code, but merely to show that his remarks out the paramount nature of the charge for land revenue, ich had previously been determined on other grounds, would cafter be governed by the express provisions of the Code.

We think, then, that the form of the 7th issue raised by the r appellate Court was wrong. The real question was not ther the defendants Nos. 2 and 3 had purchased at the revenue

(1) 1 Sch. and Lef., 379.

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sale for the defendant No. 1. Such an issue could not be raised in a suit against the defendants Nos. 2 and 3 consistently with the provisions of section 182 of the Land Revenue Code. The point for determination was whether at the time of the institution of this suit the defendant No. 1 was in possession through his agents, defendants Nos. 2 and 3, or the defendants Nos. 2 and 3 were by agreement holding the land on his behalf. As this issue was not raised in either of the Courts in a distinct form which would bring to the minds of the parties exactly what they would have to prove, we think the fairest way will be to send it down for determination leaving it to the lower appellate Court after taking such further evidence as the parties may tender or it may call for to decide what is the reasonable inference to be drawn from the various circumstances that may be proved. It may be well to look at the receipt-books in order to ascertain by whose hand the land revenue has been paid, to find out why the defendants Nos. 2 and 3 did not appear at the previous hearings, and whether they are or are not connected in their dealings with defendant No. 1, and generally to make a full enquiry into the circumstances calculated to throw light on the case.

We think the lower Court was right in holding that no mortgage-debt remained due on these fields for the reasons which it has given. If defendants Nos. 2 and 3 are holding them on their own account, they are entitled to retain them. If they are holding them for defendant No. 1, or he is otherwise in possession, the plaintiffs are entitled to recover them.

We now send down the following issue:—"Whether at the time of the institution of this suit the defendant No. 1 was in possession of Nos. 303 and 305 or either of them through his agents, defendants Nos. 2 and 3, or otherwise, or whether defendants Nos. 2 and 3 were by agreement holding them on his account?"

The finding should be returned within three months.

With regard to Survey No. 304 we think the finding of the First Class Subordinate Judge, A. P., was correct. Mr. Rele referred us to *Irava* v. *Sidramappa*[1], but that case does not support the contention that a judgment-debtor whose property

(1) I. L. R., 21 Bom., 124.

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as at a Court sale been bought by the judgment-creditor without ve of the Court can sue within twelve years to set aside the sale and recover possession. It shows that when after the death of a judgment-debtor his property is sold without notice to the heirs, those heirs can sue within twelve years to recover it. But the reasoning cannot be applied by analogy to the present case. There the auction-purchaser was not a party to the suit. Here it is only on the ground of his being a party that the sale can be avoided. The case, therefore, clearly falls under section 244, and no separate suit will lie. Section 294 provides expressly a remedy by application. See *Chintamanrav* v. *Vithabai*[1].

We, therefore, dismiss Appeal No. 944 of 1895 with costs on the appellant.

Issue sent down in Appeal No. 892.
Appeal No. 944 dismissed.

(1) I. L. R., 11 Bom., 588.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

FAKIRGAUDA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANGI (ORIGINAL DEFENDANT), RESPONDENT.*

1896. *July* 7.

Hindu law—Marriage—Lingáyets—Marriage between members of different sects of Lingáyets—Burden of proof of invalidity of marriage—Evidence.

According to the Lingáyet religion, as well as according to Hindu law, marriages between members of different sects of the Lingáyets are not illegal, and where it is alleged that such a marriage is invalid, the *onus* lies upon the persons making such allegation, of proving that such marriage is prohibited by immemorial custom.

SECOND appeal from the decision of T. Hamilton, District Judge of Dhárwár, confirming the decree of Ráo Bahádur Gangadhar V. Limaye, First Class Subordinate Judge.

The plaintiff sued to obtain possession of his wife, the defendant. The parties were Lingáyets and resided in Dhárwár.

The defendant contended that she and the plaintiff belonged to different sects of the Lingáyet caste and that there could be no lawful marriage between them.

* Second Appeal, No. 854 of 1895.