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the applicant has paid a small sum as earnest-money when entering into the contract, he cannot be treated as the owner of the land within the meaning of the section. Assuming that under section 55 of the Transfer of Property Act the applicant as against his vendor has a lien or charge upon the subject-matter of his purchase for the earnest that he has paid, and that a person holding a simple lien over immoveable property is *pro tanto* the owner of such property within the meaning of section 310A—the inclination of our opinion is to the contrary view—we cannot think that the applicant can be said to be owner of even the interest over which his lien extends. The lien or charge which the section gives him is, at the most, a contingent lien which will only become absolute if he is ready and willing to perform his contract when the time for performance arrives, or if he properly declines to perform it. Neither of the cases cited in argument—*Rakhal Chunder* v. *Dwarkanath* [1] and *Bhagabuti Churn* v. *Bisheswar Sen* [2]—though they are useful as analogies, covers the present case.

Rule discharged with costs.

Rule discharged.

(1) (1886) 13 Cal., 316. (2) (1882) 8 Cal., 367.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898. *March* 14.

MURARRAO AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1, 2), APPELLANTS, *v.* SITARAM AND ANOTHER (ORIGINAL DEFENDANTS NOS. 16, 17), RESPONDENTS.*

Partition—Suit for partition by a purchaser from a co-sharer—Decree in such suit need not be for a general partition of the entire estate—Practice.

When a purchaser from a co-sharer in a joint family estate sues to have his share severed and given to him, the Court is not bound to force the members of the family into a partition of the whole estate. It is, no doubt, open for each and every co-sharer to ask to have his share divided off and allotted to him (in which case he would have to pay court-fees according to his share). But, in the absence of such a request, the Court is not bound to determine what is the share of each of the co-sharers, and to compel him to take that share by making a general partition.

* Cross Second Appeals, Nos. 1041 and 1042 of 1897.

In such a case the High Court refused, in second appeal, to accede to the prayer of some of the co-sharers, who had not appeared in the Court of first instance, to have their shares divided off and allotted to them.

SECOND appeal from the decision of Ráo Bahádur Thakurdas M., Assistant Judge of Ratnágiri.

Suit for partition. One Zimaji Jaising was the owner of a 16-pies' share in the property in dispute. In 1865 he sold his share to Kashinath Shivram.

Out of this share Kashinath sold an 8-pies' share to plaintiff in 1884, and the remaining 8-pies' share to defendants Nos. 1 to 4.

In 1894 plaintiff filed the present suit to recover by partition the 8-pies' share he had bought from Kashinath.

Defendants Nos. 1 and 2 did not appear. Defendants Nos. 3 and 4 claimed to be the owners of the whole 8-pies' share purchased from Kashinath, and denied that defendants Nos. 1 and 2 had any interest in that share. They further stated that they had mortgaged with possession the whole of this 8-pies' share to defendants Nos. 16 and 17, that they had no objection to the plaintiffs' receiving his 8-pies' share by partition, and they prayed that their own 8-pies' share should be divided into two sub-sharers of 4 pies each, one to be awarded to each of them after the mortgage-debt was satisfied.

Defendants Nos. 5 to 15 were made parties to the suit as they were co-sharers in the rest of the family property.

The Court of first instance raised (*inter alia*) the following issue :—

Fifth Issue.—"Whether defendants Nos. 3 and 4 have an 8-pies' share, and whether the said share can be partitioned and retained in the possession of defendants Nos. 16 and 17 as mortgagees until their mortgages are redeemed."

On this issue the Court found that out of the 8-pies' share sold by Kashinath to defendants Nos. 1 to 4, defendants Nos. 1 and 2 were entitled to a 4-pies' share, and defendants Nos. 3 and 4 to the remaining 4-pies' share; and that defendants Nos. 3 and 4 had no right to mortgage the entire 8-pies' share to defendants Nos. 16 and 17.

The Court, therefore, passed a decree for partition, awarding an 8-pies' share to plaintiff, and a 4-pies' share to defendants

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Nos. 3 and 4, and directing that this 4-pies' share should be retained by the defendants Nos. 16 and 17 until their mortgage-debt was satisfied. With respect to the 4-pies' share found to belong to defendants Nos. 1 and 2, no order was passed, as those defendants were not before the Court.

Against this decision defendants Nos. 16 and 17 (the mortgagees) alone appealed to the District Court, contending that their mortgagors (defendants Nos. 3 and 4) were owners not merely of a 4-pies' share, but of the entire 8-pies' share purchased from Kashinath, and that the fifth issue raised by the first Court was not necessary for the decision of the case.

The Assistant Judge disallowed this contention and confirmed the decree of the first Court.

Against this decision defendants Nos. 16 and 17 preferred a second appeal (No. 1042 of 1897) to the High Court. Defendants Nos. 1 and 2 also filed a separate second appeal (No. 1041 of 1897), and contended that the share found to be theirs by the lower Court ought to be decided and allotted to them.

Daji Abaji Khare for appellants—*Vasudev Gopal Bhandarkar* for respondents—in Appeal No. 1041 of 1897.

Vasudev Gopal Bhandarkar for appellants (there was no appearance for respondents) in Appeal No. 1042 of 1898.

PARSONS, J.:—We do not think that we ought now in second appeal to assent to the prayer of the defendants Nos. 1 and 2 and give them a 4-pies' share in this property to be divided off and allotted to them.

The plaintiff brought the suit as a purchaser to obtain, by partition, the share he had purchased. He valued his claim at the value of that share and paid court-fees on that value. It was, no doubt, open for each and every one of the defendants (who represented the family) to have asked to have his share divided off and allotted to him, in which case he would have had to pay court-fees according to his claim, but we do not think that it was compulsory on him to have done so, still less do we think that the Court was bound in such a suit as the present, in the absence of any such request, to have determined what was the share of

each of the defendants, and to have allotted him that share and compelled him to take it by making a general partition. No doubt there are remarks in *Harkisandas Kashidas* v. *Nagardas*[1], which favour a contrary view, but they must be taken to apply to that particular case only. We see no reason why, when a purchaser wants to have the share in a family estate that he has bought divided off and given to him, the members of the family should be forced into a partition of the whole family estate.

In the present case the defendants Nos. 1 and 2 did not appear in the Court of first instance, they did not contest the fifth issue which related to the share of the defendants Nos. 3 and 4 only, and they did not appeal against the decree which allotted them no share. They want now to take advantage of the finding on that fifth issue, since it is said to have decided in their favour that they own a 4-pies' share, which the defendants Nos. 3 and 4 had no power to mortgage to the defendants Nos. 16 and 17. As a matter of fact, however, there is no such finding on that issue which can bind the parties to this second appeal. The decision said to have been arrived at is not the actual finding, though it may be the result of the finding; the finding itself is only as to the share of the defendants Nos. 3 and 4, and we could not possibly accept it as binding upon the defendants Nos. 16 and 17, since there are no certain reasons given for it but only vague suppositions, and the 4-pies' share has been ordered to remain with the defendants Nos. 16 and 17 as it is at present, until the mortgage is paid off.

All really that the Court had to do in a suit like the present was to have determined the shares in dispute, *i. e.*, the share of the plaintiff and the shares of the defendants who claimed a share and asked for that share to be allotted to them by partition, there was no dispute between the defendants Nos. 1 and 2 and the defendants Nos. 3 and 4 *inter se* as to their respective shares, and the issue, if it be extended so as to embrace the double question whether the defendants Nos. 3 and 4 had an 8-pies' share, or whether they had only a 4-pies' share, the other 4-pies share being owned by the defendants Nos. 1 and 2, was as to

(1) P. J., 1876, p. 10.

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the latter part unnecessary. Still more unnecessary was it to go into the question of the validity of the mortgage of the whole 8-pies' share by the defendants Nos. 3 and 4 to the defendants Nos. 16 and 17.

While, therefore, we confirm the decree, we must reverse the finding as to a 4-pies' and not an 8-pies' share being with the defendants Nos. 16 and 17 in right of mortgage and leave the parties to their civil rights, unfettered by any finding or order of possession in respect of the mortgage. We order each party to bear his own costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1898.
March 15.

ABDUL KADAR (ORIGINAL DEFENDANT) *v.* BAPUBHAI AND OTHERS (ORIGINAL PLAINTIFFS, &c.) RESPONDENTS.*

Mahomedan law—Joint property—Partition—Suit for share of such property—Share allotted to defendant in same suit on payment of court-fees—Practice—Procedure.

In the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus. In such a suit, if a defendant asks at the proper time to have his share divided off and allotted to him, such relief should be granted to him on payment of the necessary court-fees.

SECOND appeal from decision of G. C. Whitworth, District Judge of Ahmednagar.

The parties to the suit were Mahomedans. Their common ancestor was one Mahomed Shafi. He had four sons—Kadar, Sale, Fazal and Futte Mahomed.

The plaintiffs were the grandsons of the third son Fazal. Defendant No. 1 was the grandson of the fourth son Futte Mahomed and defendants Nos. 2 and 3 were the great-grandsons of the second son Sale. The first son Kadar left no issue.

The lands in dispute were inám lands, which had been acquired by the family during the period of Mahomedan rule.

* Second Appeal, No. 954 of 1896.