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The conclusion, therefore, to which we have come is that the plaintiff cannot be allowed at this stage of the suit to bring forward for the first time allegations which it is necessary to prove in order to show that he is entitled to a further decree against the defendant personally.

Our attention has been called to the decision in *Ram Dattu v. Sakharam Lingu*⁽¹⁾. That was a case in which the plaintiff in his plaint had claimed a personal decree although he had not at the original hearing led evidence to prove a subsisting personal obligation. It does not appear that any question of limitation arose which should have been confessed and avoided in the plaint.

We affirm the decision of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavankar and Mr. Justice Knight.

GOKULSING BHIKARAM PARDESHI (ORIGINAL PLAINTIFF), APPELLANT, v. KISANSINGH GURU LAXMANGIRI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under section 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.

C sued M on a money-bond. M having died during the pendency of the suit, his widow R and his brother N were brought by C on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be

* Second Appeal No. 245 of 1909.

(1) (1909) 11 Bom. L. R. 1127.

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executed both R and N died. C then brought on the record the defendants as the legal representatives of M. The latter denied that they were M's legal representatives or that they had any property of M's which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale: and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of M and defendants' survived to the latter at M's death; and that the plaintiff obtained no title at the Court-sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of section 244 of the Code of Civil Procedure, 1882, from asserting their title.

Held, that as the property was sold by the Court at C's instance as that of M, the question so far was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under section 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within section 244 of the Code by reason of the explanation to section 617 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned.

It was contended that whatever might have been the result if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that section 244 did not apply:—

Held, that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit.

The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, A. P. at Násik, confirming the decree passed by B. B. Kunte, Joint Subordinate Judge at Násik.

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Suit to recover possession of property purchased in execution of a decree.

The decree was passed on a money-bond passed by one Mahadevgir in favour of Chinnaji in 1882. During the pendency of the suit Mahadevgir having died, his widow Rahu and his brother Narayangir were brought on the record as his legal representatives. The decree passed was against the property of Mahadevgir.

After the decree was passed but before it could be executed both Rahu and Narayangir died. The decree-holder Chinnaji thereupon brought on the record the names of Kisangir and Nana (defendants) as the legal representatives of Mahadevgir; and sought for execution of the decree by attachment and sale of the property in dispute. It was contended by the defendants in those proceedings that they were not the legal representatives of Mahadevgir and had no property of his into their possession. The Court notwithstanding attached the property: and at the sale it was purchased by the plaintiff on the 12th August 1896. The certificate of sale was issued to him on the 24th June 1905.

The plaintiff brought this suit on the 15th August 1907 to recover possession of the property from the defendants.

It was contended in defence that the property in dispute was the joint family property of Mahadevgir and defendants: and that on the death of the former it devolved upon them by survivorship.

The Subordinate Judge held that the property was the joint family property and that it devolved upon the defendants by survivorship on Mahadevgir's death. He held further that the plaintiff's claim was barred by limitation.

On appeal this decree was confirmed by the lower appellate Court, on grounds which were stated as follows:—

It would appear that the decree-holder Chinnaji showed no regard for truth or law in placing on the record party defendants and judgment-debtors to represent the estate of Mahadevgir for the purposes of the suit and execution of the decree, inasmuch as though he knew as a matter of fact that Mahadevgir was undivided with Narayangir at the time of his death, he joins both Narayangir a brother, and Rahu, his widow, as party defendants, and after

their death defendant's 1 and 2, who are brothers to each other and cousin's sons to Mahadevgir, and defendant 3, who was neither an agnate nor cognate relation to the deceased, as judgment-debtors. Though they urged in the course of execution that they were not the heirs or legal representatives of the deceased judgment-debtors, the execution was proceeded with and the right, title and interest of Mahadevgir in the plaint land was sold with all the three defendants as parties on the record. No objection to the attachment of the property seems to have been raised by them in execution and the circumstance of the sale having been made absolute in favour of the plaintiff, with the present defendants as Mahadevgir's legal representatives, has given rise to the contention on behalf of the plaintiff that they are bound by the sale and made it necessary for me to frame the first issue in the case.

This issue should have been raised in the original Court, but as it is one purely of law and as none of the parties would or could attempt to call evidence, I have framed it here and proceeded to determine it myself. In this connection I may remark at once that the contention of the appellant's pleader that the nature of the debt should have been inquired into has no force. The plaint did not allege that the debt was binding on Narayangir or that Mahadevgir had contracted it as manager and it was not competent to the appellant to make a new case in this Court.

Though the present defendants could and should have objected to the plaint property being sold in execution as Mahadevgir's property, their omission to do so does not estop them from raising the contention in this suit, notwithstanding the provisions of section 244 of the Code of Civil Procedure, and the reason is that the plaintiff as purchaser at a Court-sale is not a representative of the decree-holder (I. L. R. 25 Bom. 631) and the provisions of the section which require that questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, etc., should be determined in course of execution and which forbid a separate suit for the same do not come into play.

No doubt in a suit between parties to execution or their representatives the question not raised in the course of execution could not be urged, but as a purchaser at a sale in execution is not a party to the suit (I. L. R. 15 Bom. 290) and as he is a representative of none of the parties, there is no bar of section 244 or of section 13, Civil Procedure Code, to the defendants taking exception to the title of the plaintiff in this suit.

Mahadevgir's interest, which came into existence with him died with him, because he was undivided co-parcener in a Hindu family and because the decree was a mere money decree and no specific charge was created by him during his life-time and because the attachment had not been laid while he was alive.

The plaintiff appealed to the High Court.

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R. R. Desai, for the appellant (plaintiff). *K. H. Kelkar*, for the respondents.

The following cases were cited:—*Prosunno Kumar Sanyal v. Kali Das Sanyal*⁽¹⁾; *Madhusudan Das v. Gobinda Pria Chowdhurani*⁽²⁾; *Ram Chandra Mukerjee v. Ranjit Singh*⁽³⁾; *Tara Lal Singh v. Sarobar Singh*⁽⁴⁾; *Collector of Jampur v. Bithal Das*⁽⁵⁾; *Krishnan v. Arunachalam*⁽⁶⁾; *Kashinath Moreshwar v. Baji Pandurang*⁽⁷⁾; *Trimbak Ramrao v. Govinda*⁽⁸⁾; *Murigeya v. Hayat Sahel*⁽⁹⁾.

CHANDAVARKAR, J. :—The facts found by the lower appellate Court, on which the question of law arising upon this second appeal turns, are shortly these.

Chimnaji valad Ramji brought a suit on a bond against Mahadevgir Gura. The latter having died during the pendency of the suit, his widow Rahu and his brother Narayangir were brought by Chimnaji on the record as the deceased's legal representatives. The suit ended in a decree, awarding the claim out of the property of the deceased. Before execution, both Rahu and Narayangir died. The decree-holder (Chimnaji) then brought on the record the present respondents as legal representatives of the deceased judgment-debtor, Mahadevgir, and applied for execution of the decree by attachment and sale of the property now in dispute. The respondents denied that they were the legal representatives of the deceased, and that they had any property of his which could be liable for the decree. All these objections were, however, negatived by the Court executing the decree and the property in dispute was attached and sold. The present appellant, having purchased it at the Court-sale, sued to recover possession from the respondents.

Both the Courts below have disallowed the claim on the ground that the property in dispute was the joint property of

(1) (1892) 19 Cal. 683.

(2) (1890) 27 Cal. 34.

(3) (1890) 27 Cal. 242, 237.

(4) (1899) 27 Cal. 497.

(5) (1902) 24 All. 291.

(6) (1892) 16 Mad. 447.

(7) (1909) 11 Bom. L. R. 699.

(8) (1891) 19 Bom. 328.

(9) (1898) 23 Bom. 237, 241, 242.

the deceased Mahadevgir and the respondents, held by them as co-parceners in a joint Hindu family, and that on Mahadevgir's death the respondents having acquired an exclusive title to it by survivorship, the appellant obtained no title at the Court-sale which he could legally assert as against the respondents.

In the lower Court it was contended for the appellant that the respondents were debarred by the provisions of section 244 of the Code of Civil Procedure from asserting their title. That Court disallowed the contention, relying on the decision of this Court in *Maganlal v. Doski Mulji*⁽¹⁾.

Act XIV of 1882, which applies to this case, laid down certain procedure as to the execution of a decree for money obtained against a person brought on the record as the legal representative of a deceased judgment-debtor. If such person denied his representative character, the Court executing the decree could either itself decide the question of representation or refer the parties to a separate suit: (section 244, last paragraph). Under section 252, the decree-holder could attach and sell the property of the legal representative in satisfaction of the decree under certain circumstances, *viz.*, when there was no property of the deceased in the possession of the legal representative and the latter had failed to satisfy the Court that he had duly applied such of the deceased's property as had come into his possession.

In the present case, according to the finding of the lower appellate Court, the decree-holder Chinnaji brought the property to sale, although he knew that the respondents were not the deceased Mahadevgir's legal representatives. The property was sold by the Court at the decree-holder's instance as that of the deceased. So far it cannot be denied, and indeed the respondents' pleader before us had to concede, that the question was one relating to the execution of the decree arising between the decree-holder and the respondents as judgment-debtors under section 252. It was, therefore, a question, in relation to them, falling within section 244 of the Code of Civil Procedure by reason of the explanation to section 647 of the

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(1) (1901) 25 Bom. 631.

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Code, that applications for the execution of decrees are proceedings in suits. The respondents were bound to object to the attachment and the sale under that section, so far as the decree-holder's action was concerned. But they did not object. It is now contended that, whatever might have been the result if the decree-holder had been a party to the present suit, the dispute now is between the auction-purchaser, who is a stranger to the previous suit and the execution proceedings therein, and the respondents, and that, therefore, section 244 does not apply. The answer to that contention is that, though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of section 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. That is upon the ground that he is precluded by section 244 from raising the question as a defence in any proceedings other than those under that section. That is the law laid down by the Privy Council in *Prosmno Kumar Sanyal v. Kabidas Sanyal*⁽¹⁾. In their judgment the ruling of the Madras High Court in *Kurijali v. Mayan*⁽²⁾ is referred to by their Lordships with approval. In that Madras case it was held that the question whether the property mentioned in the decree was available for execution was one arising between the decree-holder and the judgment-debtor's legal representative. So in the present case that is substantially the question. The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under section 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result.

(1) (1892) 10 Cal. 683.

(2) (1889) 7 Mad. 255.

This view is not inconsistent with but is supported by the judgment of this Court in *Mogaulal v. Doshi Mulji*⁽¹⁾, which is relied upon by the lower appellate Court as warranting its conclusion. In that case the question was simply between the judgment-debtor and the auction-purchaser; and therefore it was held that the question could be tried in a separate suit and that section 244 was no bar. But the judgment in that case explains the Privy Council decision in *Prosunno Kumar Sanyal v. Kalidas Sanyal*⁽²⁾, as applying where the question is virtually between the parties to a suit and the auction-purchaser is affected by its determination.

For these reasons the decrees of the Courts below must be reversed and the claim of the appellant allowed with costs throughout on the respondents.

Appeal allowed.

R. R.

(1) (1904) 25 Bom. 631.

(2) (1892) 19 Cal. 683.

APPELLATE CIVIL.

Before Mr. Justice Chaudawarkar and Mr. Justice Heaton.

JAGANNATH RAGHUNATH (ORIGINAL PLAINTIFF), APPELLANT, v.
NARAYAN L. SHETHE (ORIGINAL DEFENDANT), RESPONDENT.³

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Hindu Law—Mitakshara—Mayukha—Kamathis—Law governing Kamathis who live in Bombay—Succession—Anvatheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.

The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree: but where they differ, the Mayukha law must prevail.

The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse.*

The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belonged to a respectable family.

APPEAL from the decision of Gulabdas Laldas, First Class Subordinate Judge at Thana.*

* First Appeal No. 91 of 1906.