

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

TIMMAPPA DEVARABHATTA AND OTHERS (ORIGINAL DEFENDANTS NOS. 7 TO 17 AND 19), APPELLANTS, v. NARSINHA TIMAYA HEBAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1913.

June 24.

High Court, Bombay, Civil Circular 96, clause (1)†—Decree on mortgage—Mortgage executed by father and two sons for family purpose—Suit against the father and his sons—Decree—Execution against father and sons—Proclamation of sale putting up the right, title and interest of the father and sons for sale—A condition of sale in terms of clause (1)—Grandsons who were not parties to the suit or execution proceedings not bound by the sale.

G. and two out of his six sons forming an undivided family mortgaged family property to plaintiffs' father for family purposes. The plaintiffs brought a suit upon the mortgage against G., five of his sons and three grandsons by his sixth son who had died. The suit was decreed in plaintiffs' favour. In execution of the decree, the mortgaged property was put up to sale and purchased by the plaintiffs at the Court sale. In the proclamation of sale the right, title and interest of the defendants to the suit was mentioned; and one of the conditions of sale was in the terms of clause (1) to High Court Civil Circular 96. The plaintiffs were put in possession of the property. The defendants Nos. 7 to 14, 16 and 17 to 19, the grandsons of G. by five of his sons who were not parties to the mortgage suit or to the execution proceedings, having obstructed the plaintiffs in their possession, the plaintiffs brought the present suit to establish their title against those defendants. The defendants contended that their right to the property did not pass at the sale to the plaintiffs and they were not bound by the decree to which they were not parties. The lower Courts disallowed the contention on the ground that the defendants were represented in the suit by their fathers and consequently their rights passed at the sale to the plaintiffs. On second appeal:—

Held, that the defendants' interests in the mortgaged property did not pass to the plaintiffs at the Court-sales inasmuch as by an express declaration made by the selling Court and accepted by the purchasing plaintiffs, those interests were formally and deliberately excluded from the sale.

* Second Appeal No. 650 of 1912.

† The material portion of the Circular runs as follows:—

Clause (i).—No interest of any son, brother or other coparcener of the said judgment-debtor shall pass unless hereinbefore by name expressly specified for sale.

1913.

TIMMAPPA
v.
NARSINHA
TIMAYA.

SECOND appeal from the decision of C. V. Vernon, District Judge of Kanara, confirming the decree passed by J. A. Saldanha, Subordinate Judge at Kumta.

Suit for declaration and injunction.

One Ganpayabhat and his six sons constituted a joint family. In 1887, Ganpayabhat and his two sons who were majors, executed a mortgage of their family property for purposes of the family, to the plaintiffs' father. In 1900, the plaintiffs brought a suit on the mortgage against Ganpayabhat, his five sons, and his grandsons by his sixth son who was dead; and obtained a decree. The plaintiffs applied to execute the decree by sale of the mortgaged property. In the proclamation of sale, the right, title and interest of the defendants in the mortgaged property were put up for sale. One of the conditions of sale was in terms of clause (D) of High Court Civil Circular 96. At the Court-sale the property was purchased by the plaintiffs with the permission of the Court. They were subsequently put into possession of the property. The defendants Nos. 7 to 14, 16 and 17 to 19 who were grandsons of Ganpayabhat by five of his sons and who were not parties to the suit or to the execution proceedings, obstructed the plaintiffs in their possession. The plaintiffs eventually filed this suit to obtain a declaration that they were owners of the property by the purchase, to eject the defendants from a portion of the property and to obtain an injunction restraining the defendants from interfering with their possession. The defendants Nos. 7 to 14, 16 and 17 to 19 contended *inter alia* that their interest in the mortgaged property did not pass to the plaintiffs by the sale, for they were not parties to the suit or the execution proceedings; and their interest was expressly excluded by one of the conditions of sale.

The Subordinate Judge held that the mortgage being for a family purpose, the decree was binding on the

defendants and their interest in the estate passed at the sale. The District Judge confirmed the decree on appeal. The defendants appealed.

G. P. Murdeshwar, for the appellants.—Our interest has not passed at the sale owing to the special condition in the conditions of sale. The presence of this condition distinguishes this case from the series of decisions of our Court, *viz.*, *Trimbak Balkrishna v. Narayan Damodar Dabholkar*⁽¹⁾; *Appaji Bapuji v. Keshav Shamrao*⁽²⁾; *Bhagbut Pershad Singh v. Girja Koer*⁽³⁾; *Ramkrishna v. Vinayak Narayan*⁽⁴⁾; *Chimna v. Sada*⁽⁵⁾ and *Tatyarao v. Puttappa*⁽⁶⁾.

S. S. Patkar, for the respondents.—The mortgage was effected for a family purpose. The defendants were properly represented in the suit by their respective fathers. The effect of not impleading the sons in accordance with section 85 of the Transfer of Property Act was considered in *Ramkrishna v. Vinayak Narayan*⁽⁴⁾; *Chimna v. Sada*⁽⁵⁾; *Tatyarao v. Puttappa*⁽⁶⁾ and *Appaji Bapuji v. Keshav Shamrao*⁽²⁾; and it was held that the interests of sons always pass when they are represented in the suit by their father. The condition should not have been introduced into the proclamation of sale. It can be a proper condition only in case of money decrees.

Cur. adv. vult.

BATCHELOR, J. :—The appellants before us were in the suit defendants Nos. 7 to 14, 16 and 17 to 19, and the facts upon which this appeal has to be decided are these :—

On the 31st May 1887 the defendants' ancestor, Ganpaya, and two out of his six sons forming an

1913.

TIMMAPPA
v.
NARSINHA
TIMAYA.

⁽¹⁾ (1884) 8 Bom. 481 at p. 486.

⁽²⁾ (1890) 15 Bom. 13 at p. 19.

⁽³⁾ (1888) 15 Cal. 717,

⁽⁴⁾ (1910) 34 Bom. 354.

⁽⁵⁾ (1910) 12 Bom. L. R. 811.

⁽⁶⁾ (1910) 12 Bom. L. R. 940,

1913.

TIMMAPPA

v.

NARSINHA

TIMAYA.

undivided family mortgaged the property in suit to the plaintiffs' father. In 1900 the mortgagee brought a suit upon his mortgage against Ganpaya, all his living sons and three grandsons. A decree was made in favour of the mortgagee for Rs. 1,561-2-0. Next, the property was put to sale and was purchased with permission by the plaintiffs acting through their agent, their pleader.

The question before us is whether the present appellants' interests passed to the plaintiffs in this sale. Both the Courts below have answered this question in the affirmative on the grounds first, that the original mortgage was made for the benefit of the whole joint family, and, secondly, that the present appellants, though not parties to the original suit, were sufficiently represented in that suit by their fathers. These two propositions must be accepted, but the appellants contend that, in the special circumstances of this particular sale, their interests in the property did not pass to the purchasers. The special circumstances relied upon are two. In the first place, in the proclamation of sale 12 defendants, other persons than these appellants, were alone named, while the 11 appellants were not named or referred to, and one condition of the sale was that it covered only the right, title and interest of the "defendants" in the mortgaged property. Secondly, among the conditions of the sale was embodied Clause (l) of Sub-Rule 15 of Rule 96 of the High Court Circular Rules framed under the provisions of sections 287 and 652 of the old Code of Civil Procedure. That clause runs as follows :—

"No interest of any son, brother or other coparcener of the said judgment-debtor shall pass unless hereinbefore by name expressly specified for sale."

It is admitted that these words literally translated into Canarese formed one of the conditions under which this sale was held. It seems to me difficult to imagine any form of words more unambiguous or emphatic. It

is true that the appellants' interests were interests which might have been sold under the decree obtained, and if there had been no allusion to them at all, it may well be that they would have been deemed to pass under the sale; but here by express declaration made by the selling Court and accepted by the purchasing plaintiffs, those interests were formally and deliberately excluded from the sale.

The rule, as its terms show, was not obligatory on the Court or the parties. It was open to them, had they so chosen, to modify the terms of the rule so as to meet any apparent need. But they elected not to modify it, and the bargain between the vendor and the purchasers was precisely that these appellants' interests should not be included. That being so, and the plaintiffs having thus with their eyes open purchased only a portion of the estate, they cannot, I think, be heard to say that they purchased the entirety. In my judgment no nice question of law is involved, and certainly no question arises as to overriding any rule of Hindu Law as to the managing member's competence to represent the rest of the family. Such rules, it seems to me, go no further than this, that if proper measures had been taken in this case, the interests of the appellants might have been transferred. The answer is that by the express terms of the bargain they were not transferred, and I know of no rule, whether of Hindu or of any other law, that a person who advisedly buys a mere fraction of an estate has a good title to the whole.

This disposes of the appeal. I have not referred to the cases, because none of them touches the present point. The Circular Rule was introduced only in 1901, and no case has been referred to where the Court has had to consider the effect of the embodiment of this provision, *i. e.*, Rule 96, Clause (1), in the conditions of sale. In my opinion the effect of this provision is

1913.

TIMMAPPA

vs.

NARSINHA

TIMAYA.

1913.

TIMMAPP

v.

NARSINHA

TIMAYA.

clearly to exclude from the property sold the interests of these appellants. I think, therefore, that the appeal should be allowed and that the plaintiffs' suit should be dismissed with costs throughout as against these appellants.

SHAH, J. :—The question of law arising in this second appeal is whether in view of the condition in the proclamation of sale in terms of clause (D) of Civil Circular 96 of this Court, the right, title and interest of the present appellants passed to the plaintiffs in the property in suit.

The facts giving rise to the point are as follows :—

One Ganpayabhat and his two sons Mahableswhar-bhat and Puttabhat mortgaged the property in suit to one Ganpaya Hebar in 1887. The mortgagee filed suit No. 369 of 1900 on the said mortgage against Ganpaya, his living sons and the three grandsons (sons of Puttabhat) in which the usual mortgage decree was passed on the 17th September 1901.

In execution of that decree the right, title and interest of all the judgment-debtors in the mortgaged property were put up for sale and purchased on behalf of the plaintiffs. The plaintiffs were put in formal possession, but, as obstruction was caused to their possession, they filed the present suit to have it declared that they were owners of the property by right of purchase, and to obtain possession and injunction against the defendants. All the sons and grandsons of Ganpayabhat are joined as parties to this suit. The defendants Nos. 7 to 14, 16, 17 to 19, who are the appellants before us, were not parties to the suit of 1900. On behalf of these defendants it was contended that their interest in the property was not sold, and that the plaintiffs were not entitled to any relief as against them. In both the lower Courts this contention has failed. The present appeal is preferred by them and the same contention is

raised before us now. The appellants rely upon the condition in the proclamation, which is admittedly in terms of clause (l) of Circular 96. The clause runs as follows :—

“No interest of any son, brother or other coparceners of the said judgment debtors shall pass unless hereinbefore by name expressly specified for sale.”

It is urged on behalf of the appellants that, though the mortgage-debt may be binding upon them, and that though their right, title and interest could have been sold in execution of the mortgage-debt, in spite of the fact that they were not joined as parties to the suit of 1900, as their right, title and interest were not in fact sold, the plaintiffs cannot succeed against them. The condition in the proclamation above mentioned, they urge, renders it impossible for the plaintiffs to say now that they (the plaintiffs) in fact purchased the interest of sons and coparceners, who were not judgment-debtors.

I think that this contention should be allowed. It is clear from the condition in the proclamation of sale that the auction-purchaser purchased only the right, title and interest of the judgment-debtors and not the right, title and interest of their sons and coparceners. He must be deemed to have bid and paid for what was put up for sale and not for what was excluded in terms from the sale. It is urged for the plaintiffs that the debt is held by both the lower Courts to be binding upon the family, that the present appellants were duly represented by the judgment-debtors in the suit of 1900, that the property in suit was liable for the debt, and that the right, title and interest of all the defendants must be deemed to have been sold to the plaintiffs. It is suggested that the condition in terms of clause (l) of Circular 96 is in conflict with the rule of Hindu Law, which entitles the decree-holder to bring to sale the right, title and interest of all the coparceners, whether

1913

TIMMAPPA

v.

NARSINHA

TIMAYA.

1913.

TIMMAPPA

v.

NARSINHA

TIMAYA.

they were parties to the suit or not, and is therefore inoperative. The findings as to the binding character of the mortgage-debt and as to the liability of all the coparceners to satisfy the debt are accepted by the appellants. They do not feel concerned to dispute the proposition that their right, title and interest might have been sold, and that if there was no such express condition in the proclamation, their interest would have been rightly held to have passed to the plaintiffs. But they urge that if their interest is expressly reserved, it cannot be deemed to have passed to the plaintiffs under the auction-sale.

In each case it is a question as to what the Court intended to sell at public auction and what the purchaser expected to buy. The Court cannot sell more than what the law allows. But if the Court intended to sell less than it might have sold, or even less than it ought to have sold, no more can pass than what was in fact offered for sale: see *Simbhainath Panday v. Golab Singh*⁽¹⁾, *Pettachi Chettiar v. Sangili Veera Pandia Chinnathambar*⁽²⁾, *Abdul Aziz Khan Sahib v. Appayasami Naicker*⁽³⁾. In the present case the condition makes it clear as to what was offered for sale, and the buyer cannot be held to have purchased more than that. It was open to the decree-holder in the suit of 1900 to see that under the circumstances of this case clause (b) was omitted from the proclamation of sale. But he did not do so then, and the purchaser cannot now be heard to say that the effect should be given to the sale as if no such condition existed.

There is no authority in support of the view urged by the respondents and it is admitted that there is no decided case in which the effect of clause (b) of Civil Circular No. 96 in the proclamation of sale has been

(1) (1887) L. R. 14 I. A. 77.

(2) (1887) L. R. 14 I. A. 84.

(3) (1903) L. R. 31 I. A. 1.

considered by this Court. It appears to me that the clause has been specially devised for the purpose of avoiding the ambiguity involved in the use of the general words "right, title and interest of the judgment-debtors". The circular contemplates that the terms of the proclamation may be modified to suit the circumstances of each case. Instead of leaving the auction-purchaser to raise these questions after the sale, it enables the Court to decide, and the decree-holder to get the Court to decide, at the outset as to whether the interests of sons, brothers and coparceners are to pass under the sale to the purchaser or not. In the present case in view of the retention of the clause in the proclamation, there can be no doubt as to what was offered for sale by the Court and purchased by the plaintiffs. In my opinion there is no rule of Hindu Law which conflicts with the clause in the proclamation in any way, or which can prevent due effect being given to the said clause.

I, therefore, agree that the decree as proposed by my learned colleague should be passed in favour of the appellants.

Appeal allowed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

HARAKHBAL, PLAINTIFF, v. JAMNABAI AND OTHERS, DEFENDANTS.*

Civil Procedure Code (Act V of 1908), Order XXIII, Rule 3, section 89 and the Second Schedule—Arbitration—Suit referred to arbitration by the parties without the intervention of the Court—Award, recording of, in such cases—Procedure to be adopted in case an award is disputed.

Where a suit which is pending is referred by the parties to arbitration, without the intervention of the Court, and an award is made, the submission

* Suit No. 17 of 1912.

1913.

TIMMAPPA
v.
NARSINHA
TIMAYA.

1912.

October 17.