

Attorneys for plaintiffs :—Messrs. *Tyabji, Dayabhai & Co.*

1914.

Attorneys for defendants :—Messrs. *Jamshetji, Rustamji & Devidas.*

JOHARMAL
LADHOORAM
r.
CHETRAM
HARISING.

Suit decreed.

M. F. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

VIRCHAND VAJIKARANSKET (ORIGINAL PLAINTIFF), APPELLANT, v.
KONDU VALAD KASAM ATAR, MINOR BY HIS GUARDIAN *ad litem*
NAMBA VALAD HUSENBHAI ATAR, AND OTHERS (ORIGINAL DEFEND-
ANTS), RESPONDENTS.*

1915.

June 21.

Mortgage—Sale of mortgaged property—Suit against one of the heirs of the mortgagor—Subsequent addition of parties—Limitation Act (IX of 1908), section 22.

One K, a Mahomedan, effected a simple mortgage in favour of V on the 23rd of June 1899, the mortgage-debt becoming due on demand which was made on the 1st January 1900. K having died, a suit for sale of the mortgaged property was instituted by V against his minor son as a party in possession of the property on the 23rd of June 1911. The minor's guardian having alleged that K left other heirs, a widow and two daughters, V applied on the 29th of January 1912 to have them added as parties and they were so added on the 12th February 1912. It was contended by the added defendants that the suit was barred as against them under section 22 of the Limitation Act, 1908. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned.

On appeal to the High Court by the mortgagee,

Held, that the money was specifically charged on the whole mortgaged property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgage subsequent to the date of the mortgage.

* Second Appeal No. 193 of 1914.

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The suit as originally filed was not instituted to enforce claims against shares in the hands of heirs; it was to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor, and the addition of parties after the expiry of the time did not involve the dismissal of the suit under section 22 of the Limitation Act (IX of 1908).

Guruvayya v. Dattatraya,⁽¹⁾ followed.

SECOND appeal against the decision of J. D. Dikshit, District Judge, Thana, confirming the decree passed by B. N. Sanjana, Subordinate Judge, Kalyan.

This was a suit brought by the plaintiff to recover money due on a mortgage bond by sale of the property mortgaged. The bond was passed by one Kasam Atar, a Mahomedan, on the 23rd June 1899. In the bond it was stipulated that the mortgagor would return the whole amount in the month of *Margashirsha* any year that the mortgagee would demand. The demand was accordingly made on the 1st January 1900 and the mortgagor having died, the plaintiff on the 23rd January 1911 filed the suit against his minor son as a party in possession of the property. The guardian of the minor defendant having alleged that the deceased mortgagor left other heirs, namely, a widow and two daughters, the plaintiff applied on the 29th of January 1912 to have them added as parties and they were so added on the 12th of February 1912.

The defendants all admitted the mortgage but pleaded bar of limitation as against the subsequently added defendants.

The Subordinate Judge decreed the plaintiff's claim by directing sale of the minor defendant's share alone in the mortgaged property and dismissed the suit as against the subsequently added defendants as being barred under section 22 of the Limitation Act (IX of 1908).

⁽¹⁾ (1903) 28 Bom. 11.

The District Judge confirmed the decree on appeal.

The plaintiff appealed to the High Court.

P. B. Shingne for the appellant :—The lower Courts erred in holding that section 22 of the Limitation Act applied to the case. The parties joined were formal and not necessary; *Khurshetbibi v. Keso Vinayek*⁽¹⁾ and *Davalava v. Bhimaji Dhondo*⁽²⁾ show that in this respect there is no difference between Hindu and Mahomedan law. This is a sort of administration suit where only the liability of the deceased is sought to be enforced against his own estate: see *Muttyjan v. Ahmed Ally*⁽³⁾; *Amir Duthin v. Baij Nath Singh*⁽⁴⁾. Joinder of the parties after the period does not necessarily involve dismissal of the suit: *Guruvayya v. Dattatraya*⁽⁵⁾.

W. B. Pradhan for the respondents:—Order 34, Rule 1 of the Civil Procedure Code, 1908, has made the law more strict as to joinder of parties in mortgage suits by deleting the proviso in section 85 of the Transfer of Property Act. There is no right of representation under the Mahomedan law and the property on the death of a Mahomedan descends in different shares and is not contingent on payments of his debts. See *Assamathem Nessa Bibee v. Roy Lutcheemepul Singh*⁽⁶⁾; *Jafri Begam v. Amir Muhammad Khan*⁽⁷⁾; *Ambashankar Harprasad v. Sayad Ali Rasul*⁽⁸⁾; *Dallu Mal v. Hari Das*⁽⁹⁾; *Bussunteram Marwary v. Kamaluddin Ahmed*⁽¹⁰⁾. The cases of *Khurshetbibi v. Keso Vinayek*⁽¹⁾ and *Davalava v. Bhimaji Dhondo*⁽²⁾ do not apply to the present case. They determine the rights of an auction-purchaser. The decision of *Guru-*

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(1) (1887) 12 Bom. 101.

(2) (1895) 20 Bom. 338.

(3) (1882) 8 Cal. 370.

(4) (1894) 21 Cal. 311.

(5) (1903) 28 Bom. 11.

(6) (1878) 4 Cal. 142.

(7) (1885) 7 All. 822.

(8) (1894) 19 Bom. 273.

(9) (1901) 23 All. 263.

(10) (1886) 11 Cal. 421.

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vayya v. Dattatraya⁽¹⁾ relates to the joinder of plaintiffs. The view taken in that case is dissented from in *Mathewson v. Ram Kanai Singh Deb*⁽²⁾. The joinder was of necessary parties and as such section 22 of the Limitation Act applied.

SCOTT C. J.:—This suit was brought by a mortgagee under a simple mortgage to recover the amount of his claim by sale of the mortgaged property.

The mortgage was effected on the 23rd of June 1899 the mortgage-debt becoming due on demand which was made on the 1st January 1900. The suit was instituted after the death of the mortgagor, a Mahomedan, against his only son, a minor, on the 23rd of June 1911. It was, therefore, within time if properly constituted.

The plaintiff alleged that the mortgagor was dead, that his only heir was the defendant and that the property of the deceased was in that defendant's possession.

The defendant's guardian having alleged that the deceased left other heirs, a widow and two daughters, the plaintiff applied on the 29th of January 1912, to have them added as parties and they were so added on the 12th of February 1912.

It was then contended by the added defendants that the suit was barred as against them under section 22 of the Limitation Act. This plea found favour with the lower Courts and the suit for sale was dismissed so far as the shares of the added defendants were concerned.

In our opinion the judgments of the lower Courts cannot be supported.

The suit was properly brought by the plaintiff to enforce payment of money charged upon immoveable

(1) (1903) 28 Bom. 11.

(2) (1909) 36 Cal. 675.

property within twelve years of the date when the money sued for became due. The money was specifically charged on the whole property and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage.

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A decree for sale obtained after contest in the suit as originally constituted would have been binding on the other heirs even though they had not been added: see *Assamathem Nessa Bibee v. Roy Lutchnceput Singh*⁽¹⁾ and *Davalava v. Bhimaji Dhondo*⁽²⁾. The suit therefore was, as originally filed, one in which the plaintiff could have obtained the relief sought. It was not improperly constituted in the sense of being instituted only against one of several parties to a contract. Nor was it instituted to enforce claims against shares in the hands of heirs: it was to enforce a mortgage lien binding on the whole property in the hands of any heir of the mortgagor. As pointed out in *Guruvayya v. Dattatraya*⁽³⁾, the addition of parties after the expiry of the time for institution of the suit does not necessarily involve its dismissal under section 22. We set aside the decree of the lower Court and decree the plaintiff's claim for sale against all the defendants with all costs to be added to the mortgage-debt.

Decree reversed.

J. G. R.

⁽¹⁾ (1878) 4 Cal. 142.

⁽²⁾ (1895) 20 Bom. 338 at p. 345.

⁽³⁾ (1903) 28 Bom. 11.