1890.

VISHVANÁTH CHARDU NÁIK v. SUBRÁYA SHIVA'PÁ SHETTI.

heard on the merits. We must reverse the decree of the lower appellate Court and remand the case for a retrial on the merits. Costs to abide the result.

PARSONS, J.:—The District Judge was clearly wrong in holding that the order made in Miscellaneous No. 40 of 1885 on 22nd July, 1886, became final and binding on the plaintiff on the expiry of one year. That order was made before the sale at which the plaintiff purchased. It was, moreover, an order in favour of the judgment creditor, since it disallowed the claim to release the property from attachment. There was, it is true, a declaration added that the defendants (the intervenors) were permanent tenants of the land in question. Such a declaration, however, could not legally be made under either section 280, 281 or 282. It is contended by their pleader here that the declaration was made and inserted in the proclamation of sale after enquiry under section 289. A purchaser, however, at a Court-sale is not bound by the specifications in the proclamation of sale contained of the claims of intervenors. They are inserted for his benefit, and no binding effect as against him is anywhere given to them. On his purchase he steps into the place of the former owner of the property, and it is quite open to him to exercise and use, as against the intervenors, all the rights and remedies that that owner had. I concur, therefore, in reversing the decree and remanding the appeal for a hearing on the merits.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

PEMRÁJ CHANDRABHA'U, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SA'VALYA' GAJA'BA', (ORIGINAL DEFENDANT), RESPONDENT.*

1890. *September* 30.

Hindu law—Joint family—Family property—Mortgage—Mortgage of ancestral property by father of joint family—Decree on mortgage—Auction sale—Extent of the right, title and interest sold.

A. mortgaged his family property to C. Subsequently C. got a decree upon his mortgage, and purchased the property at an auction sale held in execution of the decree.

* Second Appeal, No. 666 of 1889.

1890

PEMRÁJ CHANDRABHÁU v. SA'VALYÁ GAJÁBÁ.

In a suit brought by C.'s son against the heirs of A. to recover possession of the property,

Held, that, having regard to the language of the mortgage-deed, there could be not doubt that the entire family property was intended to be mortgaged. The auction-purchaser, therefore, took the whole interest in the property, and not merely the interest of A. alone.

Simbhunáth Pánde v. *Goláp Singh*(1) distinguished.

Bhagbut Pershád v. *Mussumat Girja Koer*(2) followed.

THIS was a second appeal from the decision of J. W. Walker, District Judge of Ahmednagar.

Suit to recover property purchased at an auction sale held in execution of a decree.

On the 26th June, 1871, one Anáji mortgaged his ancestral property to one Chandrabháu Bápujishet Márwádi for Rs. 171 under a registered mortgage-deed. The mortgage recited that "In all Rs. 171 are due to you. * * * For the said amount are mortgaged our field lands situate at * * which have been in our enjoyment (possession) since the time of our ancestors, and have been in my possession up to this day since my father's death. The particulars of the lands are * * In all five fields comprised within the aforesaid boundaries are mortgaged for the said amount. The survey numbers of the lands are entered against my name in the Government records, and (the lands) are in my enjoyment (possession). Neither I nor any other person will be entitled to the lands until the principal amount, together with interest thereon, is paid off."

On the 22nd December, 1873, the mortgagee, Chandrabháu, obtained a decree upon the mortgage against the mortgagor Anáji.

On the 2nd April, 1875, Chandrabháu purchased the mortgaged property at an auction sale held in execution of his decree.

Subsequently to the auction sale Chandrabháu and Anáji died.

On the 4th April, 1887, Chandrabháu's son, Pemráj, brought the present suit to recover possession of the property. The suit was instituted against three sons of Anáji (defendants 1, 2 and 3)

(1) I. L. R., 14 Calc., 572. (2) L. R., 15 I. App., 101.

and his grandson the respondent Sávalyá (defendant 4), who was the son of a deceased son named Gajábá.

Defendants Nos. 1, 2 and 3 did not appear to contest the claim.

Defendant No. 4, Sávalyá Gajábá, pleaded (*inter alia*) that his father Gajábá was divided from his grandfather Anáji at the time of the mortgage transaction, and that, therefore, his interest in the property did not pass by the sale in execution of the decree against Anáji; that one of the fields, (old Survey No. 84), was mortgaged by his grandfather Anáji to one Vithu Moráji, who got a decree on his mortgage and purchased the land at an auction sale held under his decree on the 3rd February, 1875, and that he (defendant No. 4) held the field under the said Vithu, who had become the owner of it by the said purchase.

The Court of first instance found that Sávalyá's share in the property was not affected by the Court sale held against Anáji at the instance of Chandrabháu, and decreed that the lands claimed in the plaint, *minus* Sávalyá's share and also *minus* the field, (old Survey No. 84), should be awarded to the plaintiff.

Against the decree of the Court of first instance the plaintiff appealed to the District Court. In appeal the plaintiff did not include in his claim the field (old Survey No. 84). The District Judge confirmed the decree of the Court of first instance.

The plaintiff appealed to the High Court.

Dhondu Morobá Sanzgiri for the appellant:—Chandrabháu's decree, in execution of which the property was sold, was passed on a mortgage-deed executed by Anáji in his capacity as father and manager of the family. The auction-purchaser, therefore, acquired, by his purchase, an interest in the entire property and not only to the extent of Anáji's share therein—*Girdharilál* v. *Kantulál*[1]; *Trimbak* v. *Nárayan*[2]. The lower Courts relying on the ruling of the Privy Council in *Simbhunáth Pánde* v. *Goláp Singh*[3], wrongly held that Anáji's interest alone passed by the auction-sale. That case is not in point, because the mortgage upon which

(1) L. R., 1 I. App., 321. (2) I. L. R., 8 Bom., 481.
(3) I. L. R., 14 Calc., 572.

1890.

PEMRA'J CHANDRABHA'U v. SÁVALYÁ GAJÁBA'.

the decree in that case was passed, conveyed by its very terms the right, title and interest of the father alone. The only test to determine the extent of interest passed at an auction-sale is to see what the purchaser had bargained for and paid—*Mussumut Nanomi* v. *Modhan Mohun*(1). The ruling of the Privy Council in *Bhagbut Pershád* v. *Mussumat Girja Koer*(2) governs the present case.

Vásudev Rámchandra Joglekar for the respondent:—The decree was for the sale of the right, title and interest of Anáji alone, and the certificate of sale purported to convey the same to the auction-purchaser. The lower Court has remarked that Sávalyá's father, Gajábá, was separated from Anáji when the mortgage was made. Therefore Gajábá's share could not be included in the mortgage, and could not be sold under the decree passed upon the mortgage. The ruling of the Privy Council in *Simbhunáth Pánde* v. *Golúp Singh*(3) is in point.

SARGENT, C. J.:—The District Judge has held that, assuming the family to have been joint, the decision of the Privy Council in *Simbhunáth Pánde* v. *Golúp Singh*(4) is conclusive against more than Anáji's interest in the property having been sold; but that case proceeded on the ground that the mortgage, on which the decree was passed, by its very terms only passed the right, title and interest of the father. Here, however, the language of the mortgage can leave no doubt that the entire family property was intended to be mortgaged. The case comes within the reasoning of the Privy Council in their judgment in *Bhagbut Pershád* v. *Mussumat Girja Koer*(5).

But it still remains to consider whether Anáji and Gajábá were separate, the latter having a specific share in the property at the time of the sale, as found by the Subordinate Judge. The Judge has not found distinctly on that question, and we must, therefore, send back the case for the Judge to find on that issue, and transmit his finding to this Court within a month.

(1) L. R., 13 I. App., 1.
(2) L. R., 15 I. App., 101.
(3) I. L. R., 14 Calc., 572.
(4) I. L. R., 14 Calc., 572.
(5) L. R., 15 I. App., 101.

1890.

PEMRÁJ CHANDRABHAU v. SÁVALYÁ GAJÁBÁ.

Upon the issue sent down by the High Court, the lower Court found that Anaji and Gajábá were not separate, and that the latter had not a specific share in the property at the time of the auction-sale.

The following was the decision of the High Court upon the return of the above finding:—

"The Court reverses the decree of the lower Appellate Court and orders defendant (respondent) to deliver possession to the plaintiff (appellant) of the lands mentioned in the plaint, excepting old Survey No. 84. Plaintiff (appellant) to have his costs throughout."

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

1890.
October 2.

SHIREKULI TIMA'PA HEGADE, (ORIGINAL PLAINTIFF), APPELLANT, *v.* AJJIBAL NARASHINV HEGADE AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Parties—Parties interested with plaintiffs not made co-plaintiffs—Objection for want of parties not taken by defendants—Limitation.

The plaintiff sued to recover certain rents from the defendants. While the suit was pending in the Court of first instance one Devápá applied to be made a co-plaintiff, stating that he and one Sanná Ganpayá were entitled to a share in the rents. The Subordinate Judge rejected his application and at the hearing of the case partially awarded the plaintiff's claim. Both the plaintiff and defendants appealed, and the District Judge held that it was necessary to determine whether Devápá and Sanná Ganpayá were necessary parties to the suit or not. He framed an issue accordingly and sent it to the Subordinate Judge, who found that they were not interested in the subject-matter of the suit. In appeal, however, the District Judge held that Sanná was interested in the subject-matter of the suit and was a necessary party, but that if he was then joined as co-plaintiff this suit would be barred by limitation. He, therefore, held that the suit must fail for non-joinder of parties and under the Limitation Act, and he accordingly reversed the decree of the Subordinate Judge. The plaintiff filed a second appeal in the High Court.

Held, that as the objection for want of parties had not been taken by the defendants, nor any issue raised on the point, the suit was not barred, but should be heard and decided on its merits. The case of *Kálidás Kevaldás* v. *Nathu Bhagván*(1) did not apply.

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Kánara.

* Second Appeal, No. 1005 of 1889.

(1) I. L. R., 7 Bom., 317.