APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice and Mr. Justice Kemp.

HANMANDAS RAMDAYAL AND OTHERS (ORIGINAL DEFENDANTS NO. 1 TO 4), APPELLANTS *v.* VALABHDAS SHANKARDAS, MINOR, BY HIS NEXT FRIEND, ANANT BABURAO (ORIGINAL PLAINTIFF), RESPONDENT.* 1918. *March* 1.

Hindu Law—Joint family—Decree against the father—Execution against joint property—Whether son's interest passes—Auction sale of two only of the joint family properties—Suit by son for partial partition of properties sold at auction—Such a suit, not including all the family properties, whether bad in law.

The plaintiff was the son of defendant No. 5. They constituted an undivided Hindu family. Defendants Nos. 6 and 7 obtained a money decree against the 5th defendant and in execution of the decree, the defendants Nos. 1 to 4 became purchasers at the Court-sale of two of the properties belonging to the joint family. The plaintiff, a minor, thereupon, brought a suit against his father (defendant No. 5), and the decree-holders as well as the auction-purchasers for a declaration that the plaintiff's half share in the two properties did not pass to the auction-purchasers and for possession of his half share on equitable partition. The lower Court decreed the plaintiff's claim. On appeal to the High Court it was contended (1) that the son's interest in the property did pass at the Court-sale and (2) that the suit for a partial partition of the family properties was bad :

Held, that the son's interest did not pass to the purchasers at the Court-sale.

Timmappa v. *Narsinha Timaya*[1], followed.

Held also, that when a coparcener was suing an auction-purchaser it was not a valid objection to the suit that the coparcener claimed only a partial partition.

Subramanya Chettyar v. *Padmanabha Chettyar*[2] and *Ram Charan* v. *Ajudhia Prasad*[3], followed.

Held further, that the auction-purchasers should be allowed to file a suit against the plaintiff for a general partition of the entire family properties.

* First Appeal No. 148 of 1916.

(1) (1913) 37 Bom. 631. (2) (1896) 19 Mad. 267.
(3) (1905) 28 All. 50.

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Deendyal Lal v. *Jugdeep Narain Singh*[1] and *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*[2], followed.

FIRST Appeal against the decision of J. H. Betigeri, First Class Subordinate Judge at Dhulia.

Suit for a declaration.

The plaintiff was the son of defendant No. 5. They constituted a joint Hindu family. The family owned a firm conducted in the name of Khusaldas Damodardas. In 1904, in connection with certain family trade transactions, defendants No. 6 and 7 obtained a decree for Rs. 22,065 against defendant No. 5. In execution of the above decree two houses out of the ancestral property of the family of plaintiff and defendant No. 5 were attached and sold at a Court-sale and were purchased by defendant No. 1. Defendant No. 1 was put in possession of the two houses through Court on January 20, 1906. At the time of the Court-sale of 1905, the plaintiff was only four years old. In 1915, he sued to obtain a declaration that his half share in the two houses was not sold at the Court-sale and that the said share had not passed to defendant No. 1 as purchaser, alleging that the decree of 1904 was not binding on him as he was not a party to the decree and therefore his share in the property did not pass in execution proceedings thereunder. He also asked for possession of the one half share on equitable partition together with mesne profits. Defendants Nos. 2 to 4 were made parties as they had purchased one of the plaint houses from defendant No. 1.

Defendants Nos. 1 to 4 contended that defendant No. 5 had fraudulently caused the suit to be brought by plaintiff through Anandrao as his guardian; that the

(1) (1877) L. R. 4 I. A. 247. (2) (1883) L. R. 11 I. A 26.

decree of 1904 had not been obtained for immoral debts and that the plaintiff was bound by the decree and the Court-sale.

Defendant No. 5 supported the plaintiff's claim.

Defendants Nos. 6 and 7 pleaded that the trade transactions in respect of which the decree of 1904 was obtained were entered into by defendant No. 5 as manager of the family consisting of plaintiff and himself; that the decree was binding on the plaintiff and the suit for partial partition was bad. The Subordinate Judge allowed the plaintiff's claim holding that the decree of 1904 was not binding on the plaintiff; that the half share of defendant No. 5 was actually intended to be sold and purchased by defendant No. 1 in execution of the decree; and that the plaintiff was entitled to get a partition of his half share in the properties in suit. He ordered "that the plaintiff do recover by partition his half share in plaint houses as against defendants."

The defendants Nos. 1 to 4 appealed to the High Court.

Bhulabhai J. Desai with *G. S. Mulgaonkar* (for *T. R. Desai*) for the appellants:—The lower Court should have held that the son's interest passed at the Court-sale under the circumstances of the case. We submit that the case of *Timmappa* v. *Narsinha Timaya*[1] does not apply to the facts of the present case because here the first suit was brought against the joint family firm and not against the father personally.

Secondly, that the two houses in suit are a part of the joint family properties and the plaintiff sues to recover half of them. Such a suit for partial partition, without bringing into hotch-pot all the family properties is bad in law and should not be allowed. On the

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authority of the Privy Council ruling in *Appovier* v. *Rama Subba Aiyan*[1] we submit that the plaintiff cannot say that he has got a certain definite share as long as the family remained undivided. The plaintiff is not a tenant-in-common but a coparcener owning the whole. He cannot, therefore, claim to be entitled to a half share in these two properties. The proper remedy of the plaintiff is to bring a suit for general partition. We rely on *Pandurang Anandrav* v. *Bhaskar Shadashiv*[2] and *Udaram Sitaram* v. *Ranu Panduji*[3].

Setlur with *M. V. Bhat*, for the respondent:—There is a substantial difference between the suit of a stranger purchaser and that of a coparcener for partial partition. The son is entitled to the whole property, while the purchaser at the Court-sale gets only the right, title and interest of the father on partition. On the authorities of *Deendyal Lal* v. *Jugdeep Narain Singh*[4] and *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*[5] we submit that the proper course for the Court was under such circumstances to restore possession of the whole property to the son and force the Court purchaser to bring a general partition suit including all the family property and joining all the proper parties. The same principle is deducible from the case of *Subramanya Chettyar* v. *Padmanabha Chettyar*[6] and *Ram Charan* v. *Ajudhia Prasad*[7].

BATCHELOR, Acting C. J.:—This is an appeal from a judgment and decree of the First Class Subordinate Judge of Dhulia. The plaintiff was the son of the 5th defendant, these two persons constituting an undivided family. It appears that among the family assets was a

(1) (1866) 11 Moo. I. A. 75 at p. 89.
(2) (1874) 11 Bom. H. C. R. (A. C. J.) 72.
(3) (1875) 11 Bom. H. C. R. (A. C. J.) 76.
(4) (1877) L. R. 4 I. A. 247.
(5) (1883) L. R. 11 I. A. 26.
(6) (1896) 19 Mad. 267.
(7) (1905) 28 All. 50.

firm conducted in the name of Khushaldas Damodardas. In 1904, the present defendants Nos. 6 and 7 filed a suit in the Court of Dhulia to recover a sum of Rs. 22,000 odd, upon certain cotton transactions which they had with the firm of Khushaldas Damodardas. The defendants Nos. 6 and 7, by this suit, sued to recover the money from the present 5th defendant, the father of the plaintiff. It was not then known that the 5th defendant had a son, or that there was any other member of the family, besides the 5th defendant. In March 1905, the claim was decreed against the 5th defendant. In April following, an application was made for execution, and in the course of the execution, the present appellants, who were defendants Nos. 1 to 4 at the trial, became the purchasers of two of the properties belonging to the joint family. In January 1906, the appellants were put into possession of these two properties, and in the followng month they obtained a sale certificate.

The present plaintiff, who was born in 1900 or 1901, brought this suit against his father, the 5th defendant, and the decree-holders, defendants Nos. 6 and 7, as well as against the auction purchasers, the present appellants, claiming a declaration that the plaintiff's half share in the properties did not pass to the appellants at the Court-sale, and claiming also possession of his half share on equitable partition, together with mesne profits.

The learned Judge of the lower Court has allowed the plaintiff's claim. Upon the view which the learned Judge below took of the case, the terms of his decree are formally correct, except in one particular, and that is, in his description of the plaintiff's share as a "half share" in the plaint houses. It appears to me, that the word "half" occurring in these passages in the decretal order should be altered to the word "undivided"

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and with this verbal correction, the decree, as it stands, is a correct order, assuming that the learned Judge's view on the law of the case is correct.

On behalf of the present appellants, two points have been taken by their learned counsel. The first of them may, I think, be disposed of in very few words. The contention here is that on the facts of the case, the lower Court should have held that the son's interest also passed at the Court-sale. The learned Judge below has disallowed the defendant's contention upon this point in reliance upon this Court's ruling in *Timmappa* v. *Narsinha Timayya*[1]. I have no doubt that the learned Judge was right in thus disposing of the point, and that no distinction can be drawn between the present facts, and those upon which the case of *Timmappa v. Narsinha Timayya*[1] was decided. It is unnecessary for us to consider whether the ruling in *Timappa's case*[1] could be distinguished, if in fact, the creditor's suit of 1904 had been brought against the joint family firm. For, I am clear upon the facts on this record, that this suit was not so brought, but was brought against the father personally. I hold, therefore, following *Timmappa* v. *Narsinha Timaya*[1], that the learned Judge below was right in deciding that the son's share did not, in fact, pass to the purchasers, at the auction sale.

But the second point taken on the appellants' behalf is more substantial and difficult. The facts are that the sale in execution was held in *bona fide* ignorance of the existence of the plaintiff as the son of the 5th defendant, and that over and above the two properties, now in controversy, there are other properties belonging to the joint family. In this condition of the facts Mr. Desai has contended that this suit by the son for a

[1] (1913) 37 Bom. 631.

partial partition of the properties is bad. The learned counsel began his argument upon this point by reminding us of Lord Westbury's language in *Appovier* v. *Rama Subba Aiyan*[1] where his Lordship says: "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rents, a certain definite share."

That being so, the son, as the argument proceeded, is not a tenant-in-common, but a coparcener jointly owning the whole, and the plaintiff consequently cannot claim to be entitled to a half share in just these two particular properties out of all the properties owned by the joint family. His claim must be, argued counsel, that on a general partition of the joint family property, he and his father are entitled to equal shares. It was pointed out that in a somewhat similar case before the Calcutta High Court, *Koer Hasmat Rai* v. *Sunder Das*[2], Mr. Justice Mitter, in delivering the judgment of the Court, said: "If this suit be treated as one for partition, the plaint was open to the objection that the whole of the family property was not included in it. This is not a mere technical objection, because on partition of the whole of the joint family property the Mouzahs in dispute might under certain circumstances fall entirely to the father's share."

So, here, Mr. Desai contended that if the son was relegated to his proper remedy of a suit for general partition, the result would ordinarily be that the Court effecting the partition would be able, if it so chose, in

(1) (1866) 11 M. I. A. 75 at p. 89. (2) (1885) 11 Cal. 396 at p. 399.

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working out the equities between the parties to allot to the father as his share those properties which at the execution sale passed to the present appellants. It was observed that this argument received strong support both from the language of Mr. Justice West in *Pandurang Anandrav* v. *Bhaskar Shadashiv*[1], and from the judgment of Sir Michael Westropp C. J. in *Udaram Sitaram* v. *Ramu Panduji*[2].

On the whole, therefore, it was contended that this suit could not succeed, and that the Court should direct the plaintiff, if so advised, to amend his plaint so as to convert the suit into one for general partition, so that on such general partition, if made, the equities between the parties might be adjusted in the manner which I have indicated. It is unnecessary, however, to consider what the Court's view would be upon this argument if the point were *res integra*, open to determination now without reference to pronouncements by a higher Court and with reference only to the decisions of Sir Michael Westropp and Sir Raymond West. Those decisions were delivered in 1875, and in 1877 in the case of *Deendyal Lal* v. *Jugdeep Narain Singh*,[3] their Lordships of the Privy Council have, I think, indicated their preference for another course of procedure in such litigation. In considering this decision of the Privy Council's in contrast with the judgments of Sir Raymond West and Sir Michael Westropp, it is, I think, of some materiality to point out that in the Bombay suits the plaintiff was not the coparcener but the purchaser, whereas before the Privy Council the converse was the case. In *Deendyal's case*[3] their Lordships at the end of their judgment say that they "are of opinion that they ought not to interfere

[1] (1874) 11 Bom. H. C. R. (A. C. J.) 72.

[2] (1875 11) Bom. H. C. R. (A. C. J.) 76.

[3] (1877) L. R. 4 I. A. 247.

with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the respondent (that is, the plaintiff, the son of the judgment-debtor). But they think that the decree should be varied by adding a declaration that the appellant, as purchaser at the execution sale, has acquired the share and interest of Toofani Singh in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition."

This method of dealing with such suits was followed by their Lordships in the latter case of *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*[1], where the judgment of their Lordships was delivered by Sir Barnes Peacock. That was a case under the Mitakshara law where the right, title and interest of a father in the joint family estate had been sold in execution of a money decree, and upon the question as to what the purchaser took at such a sale Sir Barnes Peacock says: "The bond-holder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The interest which is purchased is not, as Mr. Doyne argued, the share at that time in the property, but it is the right which the father, the debtor, would have to a partition, and what would come to him upon the partition being made."

Though for particular reasons explained in that case their Lordships did not interfere with the High Court's decree, they took occasion to refer to *Deendyal's case*[2], and to point out that "the decree which ought properly to have been made would have been that the plaintiff, the first respondent, should recover possession of the

[1] (1883) L. R. 11 I. A. 26 at p. 29. [2] (1877) L. R. 4 I. A. 247.

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whole of the property, with a declaration that the appellant, as purchaser at the execution-sale, had acquired the share and interest of Shib Perkash Misser, and was entitled to take proceedings to have it ascertained by partition." It seems to me that these decisions of the highest Tribunal conclude the matter now before us. And I need only refer to the cases of *Subramanya Chettyar* v. *Padmanabha Chettyar* [1] and *Ram Charan* v. *Ajudhia Prasad* [2], as authority for the view that when a coparcener is suing an auction-purchaser it is not a valid objection to the suit that the coparcener claims only a partial partition.

On these grounds, I think that the determination of this suit must follow the principles of the Privy Council judgments. I would allow the lower Court's decree to stand with the verbal amendment which I have already specified, but I would stay the execution of the decree for a period of three months, directing that, if during that period of three months the present appellants file a suit for partition against the plaintiff, the stay of the present decree should last until the disposal of the appellant's suit for partition, but if such suit for partition be not brought within the three months allowed, then this appeal to be dismissed with costs. It is not disputed that the appellants here as purchasers at the execution sale have acquired the share and interest of the father, defendant No. 5, in this property. The appellants will pay half the respondent's costs and bear their own costs in this appeal.

KEMP, J. :—The 5th defendant is the father of the minor plaintiff. The plaintiff brings this suit against defendants Nos. 6 and 7, who are the holders of a decree against his father, defendants Nos. 1 to 4, the

[1] (1896) 19 Mad. 267.

[2] (1905) 28 All. 50.

purchasers at the auction sale held in execution of that decree, and 5th defendant, his father, for a declaration that the plaintiff's half share in the two properties in the suit being part of the joint family property of the plaintiff and the 5th defendant, was not sold in execution of the decree against his father, and for possession of his half share by equitable partition, and mesne profits.

Now, an auction-purchaser of the share of a coparcener sold in execution of a decree against the coparcener, in order to separate the share of the coparcener from the joint family property, must bring a suit for partition. It has been held by the Privy Council in the cases referred to by my Lord the Chief Justice that where he does not do so but obtains possession the other coparceners are entitled to sue to eject him and that all that the auction-purchaser is entitled to in such a suit is a declaration that he is entitled to the share of the coparcener against whom the decree has been passed. Possibly, the reason for that was that the auction-purchaser should not be allowed to avoid the necessity of having to file a suit for partition by obtaining possession of any portion of the joint family property by virtue of his purchase under the decree. But, in effect, what the plaintiff in this suit claims is a partition of the two properties which are in possession of the auction-purchaser. So that he consents to a partial partition of those two properties. The decisions in the cases of *Ram Charan* v. *Ajudhia Prasad* [1] and *Subramanya Chettyar* v. *Padmanabha Chettyar* [2] show that he may bring such a suit. But in order to avoid any dispossession of the plaintiff as regards these two properties which might be caused

[1] (1905) 28 All. 50. [2] (1896) 19 Mad. 267.

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if the auction-purchaser were relegated to a suit for partition and the plaintiff now put into possession, it is desirable that execution in this case should be stayed. I, therefore, agree that the decree of the lower Court, with the amendment of the word " half share" into "undivided share," should be allowed to stand, and that there should be a stay on the terms proposed by my Lord, the Chief Justice.

Decree confirmed.

J. G. R.

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Before Mr. Justice Beaman and Mr. Justice Heaton.

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VISHVESHWAR VIGHNESHWAR SHASTRI (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* MAHABLESHWAR SUBBA BHATTA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 7), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sections 6, clause (b), *109 and 111 clause* (g)—*Lessor and lessee—Transfer of lessor's interest—Breach of condition prior to the transfer—Right to enforce forfeiture by the transferee.*

A *mulgeni* lease provided that the lessee was not to alienate the property leased. The lessee committed a breach of the condition by sale of his rights under the lease to defendant No. 2 in 1908. In 1911, the plaintiff purchased the landlord's rights from the lessor who had not given the lessee notice of his intention to enforce the forfeiture before the transfer. The plaintiff having sued to recover possession of the property on breach of the condition, defendant No. 2 contended that the plaintiff could not take advantage of the breach of condition incurred before the assignment in his favour,

Held, disallowing the contention, that the plaintiff was entitled to recover possession of the property from defendant No. 2.

APPEAL under the Letters Patent against the decision of Shah J. in Second Appeal No 1018 of 1914, preferred against the decision of C. V. Vernon, District Judge of Kanara, confirming the decree passed by J. A. Saldanha, Subordinate Judge at Kumta.

*Appeal under the Letters Patent, No. 39 of 1916.