## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

1921. *January* 15.

SHANKAR DAJI NAIK (ORIGINAL DEFENDANT No. 10), APPELLANT *v.* DATTATRAYA VINAYAK KHANDULIKAR AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS*.

*Civil Procedure Code (Act V of 1908), section 2, clause (11), Order XXI, Rule 22—Decree against a judgment-debtor who dies—Execution against his legal representative—True legal representative not brought on record—Sale of property in execution—Suit by auction purchaser to recover possession of property from true legal representative—Sale not binding on true legal representative.*

The plaintiff having obtained a decree applied after the death of the judgment-debtor, for execution against the property of the deceased, bringing the latter's brother's widow on the record as legal representative. At that time, the plaintiff knew that the debtor had bequeathed his property by will to his mistress R. The executing Court made no inquiry as to who the real legal representative was, and, the widow not appearing, the judgment-debtor's property, valued at Rs. 120, was sold to the plaintiff's brother-in-law for Rs. 11 and subsequently resold by him to the plaintiff. In the meantime R obtained probate of the will and sold the property to defendant No. 10, putting him in possession. The plaintiff having sued to recover possession of the property from defendant No. 10 :—

*Held*, that defendant No. 10 was entitled to ask the Court to hold that as against him the auction purchaser had obtained no title to the property.

*Held*, further, that the right of defendant No. 10 to dispute the fact that the estate was properly represented had still been preserved ; and, as he had clearly shown that the estate as a matter of fact had not been properly represented, the sale could not be binding upon him :

*Malkarjun* v. *Narhari*(1) and *Khiarajmal* v. *Daim*(2), discussed.

*Held*, also, that R was, from the date of the testator's death, his true legal representative ; and that the inference to be drawn from the facts found was that the plaintiffs were endeavouring to acquire a right to the debtor's property in fraud of R.

* Second Appeal No. 29 of 1919.

(1) (1900) 25 Bom. 337. (2) (1904) 32 Cal. 296.

Per MACLEOD, C. J. :—"An execution-creditor seeking execution against party can serve notice under Order XXI, Rule 22 [of the Civil Procedure Code] on a person intermeddling with the estate of the deceased, and that would be service on the legal representative. It does not follow that he thereby secures himself against any objection that may be raised in the execution proceedings which continue after the service of such notice. He is liable to be met with the objection afterwards, either that the person on whom notice was served was not as a matter of fact intermeddling with the estate, or that as a matter of fact there was a true legal representative in existence at the time. It cannot be that execution proceedings can be good against the true legal representative without notice, merely by serving notice upon some one, whom I may call a *quasi*-legal representative, on the ground that he was intermeddling."

"There is no necessity for an executor or executrix under a will executed by a Hindu to obtain probate. That is not compulsory in this country. It is only when proceedings have to be taken in a Court of Justice and when it is necessary in such proceedings for the plaintiff to prove his title under the will to the reliefs he claims that the Court will insist upon probate or letters of administration being granted before the plaintiff can take advantage of the decree."

SECOND appeal from the decision of D. A. Idgunji, Assistant Judge of Ratnagiri, reversing the decree passed by Abraham Isaac, Additional Subordinate Judge at Malvan.

Suit to recover possession of property.

The facts were that the first plaintiff's father Vinayak obtained a money decree against Narayan in 1904. Vinayak applied to execute the decree against Narayan's estate, as Narayan died in the meanwhile. Narayan had no wife or children, but he had a mistress Rangutai. He bequeathed the whole of his property to Rangutai by a will. The only near relation that he had at the time of his death was Taramati, widow of his brother. All this was known to Vinayak: still he chose to bring Taramati only on the record as the legal representative of Narayan. She did not appear. In the execution proceedings that followed the property which was valued at Rs. 120 was sold for

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Rs. 11 to the second plaintiff, Ramkrishna, who was a brother-in-law of the first plaintiff, on the 6th July 1905. The first plaintiff obtained symbolical possession of the property on the 28th October 1908, and on the 4th July 1911, Ramkrishna sold the property to him.

In the meanwhile, on the 26th November 1904, Rangutai applied for probate of Narayan's will; and obtained it on the 21st December 1905. She sold Narayan's property to defendant No. 10 in 1915.

In 1915, the plaintiffs sued to recover possession of the property.

The Subordinate Judge dismissed the suit, holding that the estate was not properly represented at the sale, which was invalid, and that it was competent to defendant No. 10 to raise the contention as to invalidity of the sale although more than a year had elapsed since its date.

This decree was, on appeal, reversed by the Assistant Judge, who held that Taramati properly represented Narayan's estate in the execution proceedings, and that the sale was perfectly valid. The learned Judge decreed the suit.

Defendant No. 10 appealed to the High Court.

*G. S. Rao*, for *S. Y. Abhyankar*, for the appellant.

*A. G. Desai*, for respondent No. 1.

MACLEOD, C. J.:—The first plaintiff sued to recover separated possession of a one-third share in the suit property, alleging that this property was purchased by the second plaintiff on the 6th of July 1905 at a Court-sale in execution of a decree against one Narayan Fakir; that the second plaintiff obtained possession of the property on the 28th of October 1908 and sold his right to the first plaintiff by a sale deed dated the

4th of July 1911. The contesting defendant was defendant No. 9, Rangutai, who apparently was not made a defendant in the first instance. She and the 10th defendant, to whom she had sold the property in suit, appear to have been added after the suit was filed. The defendant No. 9 was a beneficiary under the will executed by the deceased Narayan on the 22nd of September 1904. The father of the first plaintiff had obtained a money decree against Narayan Fakir on the 29th of January 1904. Narayan died in Bombay on the 28th of September 1904. By his will he bequeathed his property to his mistress Rangutai as he had no wife or children. On the 2nd of November 1904 Vinayak made an application for execution of his decree against the property of the deceased Narayan, and under Order XXI, Rule 22, he was bound to issue notice against the legal representative of the deceased Narayan. He served the notice on Taramati, the widow of Narayan's brother Bala. The suit property was accordingly attached and brought to sale. The sale had to be repeatedly put off for want of bidders and finally on the 6th of July 1905 the second plaintiff, who happens to be the brother-in-law of the first plaintiff, purchased three lots for Rs. 11 although they were valued in the Darkhast application at Rs. 120. The first plaintiff, his father the original decree-holder apparently having died, received, as the Judge observes, symbolical possession of the property on the 28th of October 1908 although the second plaintiff, the auction purchaser, did not sell to the first plaintiff until 1911. Meanwhile Rangutai had applied to the District Court for probate of the will of the deceased Narayan on the 26th of November 1904. Her application was opposed by Narayan's cousin Rama who set up a contention that he and his cousin were the next heirs to the deceased. Finally on the 21st of December 1905 Rangutai's application was

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granted. We have then this state of facts, that the legal representative of Narayan was Rangutai and there was no obligation on her to apply for probate of the will. Though before probate was granted, it would be open to any one to contend that she was not the legal representative of the deceased, still she was the person who *prima facie* should have been served with a notice under Order XXI, Rule 22. Therefore she objects in her written statement to the sale on the ground that she had no notice as required by law, and that the decree-holder had intentionally joined different persons as the heirs of the deceased in the execution proceedings. In 1915 Rangutai sold her interest in the suit property to the 10th defendant.

The trial Court dismissed the plaintiff's suit with costs. The second issue was: whether, as defendant No. 10 contends, the auction sale was invalid for want of proper representation. That issue was found in the affirmative.

Now it is admitted that notice was served on Taramati, but no question was raised in the execution proceedings whether Taramati was or was not the legal representative of Narayan. It was not proved that Rangutai had any notice whatever of these execution proceedings, although there seemed to be evidence that the execution-creditor had knowledge that probate proceedings were going on. Under section 2, clause (11) of the Civil Procedure Code the term "legal representative" includes any person who intermeddles with the estate of the deceased. Therefore an execution-creditor seeking execution against a party can serve notice under Order XXI, Rule 22, on a person intermeddling with the estate of the deceased, and that would be service on the legal representative. It does not follow that he thereby secures himself against any

objection that may be raised in the execution proceedings which continue after the service of such notice. He is liable to be met with the objection afterwards, either that the person on whom notice was served was not as a matter of fact intermeddling with the estate, or that as a matter of fact there was a true legal representative in existence at the time. It cannot be that execution proceedings can be good against the true legal representative without notice, merely by serving notice upon some one, whom I may call a *quasi*-legal representative, on the ground that he was intermeddling. It seems obvious, therefore, that after the execution sale which was held after notice to Taramati, Rangutai could have filed a suit to set aside the sale on the ground that there were irregularities in the proceedings owing to the notice not having been served upon her. In order to succeed in that suit she would have to bring a suit within the period allowed by the Indian Limitation Act. It does not appear to have been considered in either Court whether as a matter of fact Taramati was intermeddling with the estate of Narayan. Considering that Narayan was entitled to an undivided one-third share in the suit property it is extremely unlikely that there was any evidence at all that Taramati was intermeddling with Narayan's undivided share, and it is also most probable that she was served with notice, not because she was intermeddling, but because she was the widow of Narayan's brother.

In appeal the decree of the lower Court dismissing the suit was set aside. The learned Judge considered that the estate of the execution-debtor Narayan was duly represented, that the sale was not invalid on the ground that the estate was not duly represented, that the second plaintiff did not act as Benamidar at the Court sale to the first plaintiff, and accordingly passed

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a decree that the 1st plaintiff, appellant No. 1, was entitled to recover possession of one-third of the property in suit on an equitable partition.

Now it seems perfectly clear that there was a defect in the execution sale. Until that defect was discovered it is perfectly true that the auction-purchaser would have seemingly a good title, and if he had got possession of what he had purchased and no proceedings had been taken within the time allowed to set aside the sale, his title would become absolute. But it makes all the difference that he did not get possession but merely a certificate of sale, and until he could get possession of the suit property from the person actually in possession, his title would be open to any objection that might be taken by the person in possession, for with regard to any person in possession the certificate of sale might be waste-paper. It seems to me a perfectly ordinary case in which a person asserting a title was endeavouring to eject a party in possession. Clearly the person asserting the title had to prove it, and it was open to the defendant to prove, as far as the plaintiff was concerned, that his title was not a good one, and the question of limitation did not arise.

The result must be, in my opinion, that the defendant is entitled in this suit to ask the Court to hold that the auction-purchaser as against the defendant obtained no title to the suit property. In my opinion that is so, unless the auction-purchaser can prove that the execution sale was held in conformity with the conditions of the Civil Procedure Code. Against any outsider it may well have been that the present contention of the defendant would not succeed. The plaintiff would be able to show that he had served notice on some one purporting to be the legal representative, and that the sale was held accordingly, and he would be entitled to get possession on the basis of his certificate of sale.

But against this defendant clearly it would not be sufficient to prove only that notice had been served upon some one purporting to be the legal representative. This is a case of the true legal representative being in possession and being attacked by the Court purchaser who had purchased at a sale held without notice to the true legal representative. We have been referred to the case of *Malkarjun* v. *Narhari*[1], but there the facts were entirely different. The sale had been held in execution proceedings. The question who was the legal representative of the deceased execution-debtor had actually been adjudicated upon by the executing Court. It seems that the adjudication was wrong. Their Lordships of the Privy Council, admitting that there had been an irregularity, decided that the aggrieved party had a remedy prescribed by law for setting matters right under section 311 of the Code of 1877 or by suing to get the order set aside. But as the plaintiff in the suit before them had not taken that course, his rights had been lost. The decision in this case was explained in the case of *Khiarajmal* v. *Daim*[2]. Their Lordships said in reference to the remarks of Lord Hobhouse in *Malkarjun* v. *Narhari*[1]: "If [the Court] decides wrong, the wronged party can only take the course prescribed for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed." Therefore if the present defendant was plaintiff suing to recover Narayan's one-third share in this property, clearly he would be out of Court, because he ought to have filed the suit within the time allowed to get the Court sale set aside. If he had filed his suit within the proper time he would have had a very much stronger case than that of the plaintiff in *Malkarjun* v. *Narhari*[1] as there had been no adjudication whatever on the question whether or not Taramati was a person

[1] (1900) 25 Bom. 337. [2] (1904) 32 Cal. 296 at p. 314.

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on whom notice ought to have been served under Order XXI, Rule 22. Therefore I think that the finding of the lower appellate Court that the deceased execution-debtor, Narayan, was duly represented at the Court sale was erroneous. To this extent it might appear that the estate was represented, because notice was served on some one who was called the legal representative. But the right of the defendant in this case to dispute the fact that the estate was properly represented had still been preserved, and therefore the defendant having clearly shown that the estate as a matter of fact was not properly represented, the sale cannot be binding upon him.

On the general aspect of the proceedings there seems little doubt that the decree-holder and the plaintiffs were acting in collusion in order to obtain title to the suit property by a Court sale. They knew before the Court sale that Narayan had left a will and it was their duty to ascertain whether there was any one named in the will who could be dealt with as the legal representative. It was argued for the respondent that until Rangutai obtained probate she was not the legal representative of the deceased. But there is no necessity for an executor or executrix under a will executed by a Hindu to obtain probate. That is not compulsory in this country. It is only when proceedings have to be taken in a Court of Justice and when it is necessary in such proceedings for the plaintiff to prove his title under the will to the reliefs he claims that the Court will insist upon probate or letters of administration being granted before the plaintiff can take advantage of the decree. Clearly from the date of Narayan's death Rangutai was his true legal representative. Vinayak before the execution sale was perfectly aware of that fact. He served a notice upon the widow of Narayan's brother. He had not even proved that the widow was in

such possession of the estate that she could be called an intermeddler under section 2, clause 11 of the Civil Procedure Code, and as a matter of fact one may safely infer that she was served with notice as being one of the relations by marriage of Narayan. Then we have this fact that this property was sold at an undervalue and that it was purchased by a brother-in-law of the execution-creditor's son who some years after the sale purported to obtain a better title to the property by taking a conveyance from him. All those are facts from which a Court is entitled to draw an inference that the plaintiffs and Vinayak were acting in collusion with each other, and the question what inference should be drawn from a certain set of facts is a question of law which can be dealt with in second appeal. It seems to me that the only possible inference to be drawn from the facts proved is that the plaintiffs were endeavouring to acquire a right to Narayan's property in fraud of Rangutai.

I think therefore that the decree of the trial Court was correct, that the appeal must be allowed and the plaintiffs' suit dismissed with costs throughout.

The cross-objections are dismissed with costs.

SHAH, J.:—I concur in the order proposed by my Lord the Chief Justice. I agree that the sale held by the Court in the execution proceedings, at which the plaintiff No. 2 became the auction-purchaser is null and void in this case, because the proceedings were held in the absence of and without notice to the true legal representative of the deceased judgment-debtor Narayan. It is clear on the facts of this case that throughout these proceedings the true legal representative of Narayan was the executrix appointed under his will. She was never mentioned as the legal representative in the proceedings, nor was any notice given to

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her as required by Order XXI, Rule 22. The person who was mentioned as the legal representative was Taramati, the widow of Narayan's brother. She was described as the heir of the deceased Narayan. But in view of the will left by Narayan the heir was not the legal representative, nor is it clear on the facts that she was the next heir apart from the will. However that may be, it is clear that in the execution proceedings, though a notice was served upon Taramati, she did not appear and there was no adjudication by the Court, right or wrong, that Taramati was the legal representative of the deceased Narayan. The sale was thus held in the absence of the true legal representative and without the necessary notice to that representative of the execution proceedings. The effect of initiating the execution proceedings after the death of the judgment-debtor in the absence of the true legal representative and without any notice to her is that the sale is null and void and that it confers no title upon the auction-purchaser.

In this view of the matter it is not necessary to consider whether, if the sale were merely voidable at the instance of the true legal representative, she is prevented in this suit from contesting the title of the auction-purchaser in virtue of her having failed to take the necessary steps to have the sale set aside within one year from the date of the sale. If the person mentioned as the heir of the deceased was held in the execution proceedings to be the legal representative of the deceased, rightly or wrongly, as was the case in *Malkarjun* v. *Narhari*[1] the question which I have just mentioned might have arisen. It is a question upon which I feel some difficulty in coming to a conclusion; and it is not necessary for the purposes of this appeal to express any final opinion on the point.

[1] (1900) 25 Bom. 337; L. R. 27, I. A. 216.

In view of the observations in *Khiarajmal* v. *Daim*[1] and *Raghunath Das* v. *Sundar Das Khetri*[2] with reference to *Malkarjun's case*[3] I feel no hesitation in holding in this case that the Court sale gave no valid title to the auction-purchaser and that the sale was null and void.

As regards the general aspect of the case, I agree that the facts proved in the case really indicate an attempt on the part of the decree-holder to get the property of the deceased judgment-debtor sold at an undervalue to a near relation of his in the absence of and without notice to the true legal representative by mentioning as the legal representative of the deceased judgment-debtor a person who is not shown now and who was not shown in the execution proceedings to have been the legal representative of the deceased judgment-debtor in any sense. Taramati is not shown to have intermeddled with the estate and, as I have said, she was mentioned as the heir of the deceased, in which capacity in view of the will she could not represent the deceased Narayan.

*Appeal allowed.*

R. R.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

GURUSHANTAPPA BIN GURAPPA KHOBBANNAWAR AND OTHERS (ORIGINAL DEFENDANTS 1 TO 4), APPELLANTS *v.* MALLAVA KOM SANGAPPA CHAVADI (ORIGINAL PLAINTIFF), RESPONDENT*.

*January* 18.

*Landlord and tenant—Covenant against sub-letting—Tenant sub-letting at higher rent—Breach of covenant—Claim for damages—Damage must be proved.*

* Second Appeal No. 555 of 1920.

(1) (1904) 32 Cal. 296 ; L. R. 32 I. A. 23. (2) (1914) L. R. 41 I. A. 251.

(3) (1900) 25 Bom. 337 ; L. R. 27 I. A. 216.