

## APPELLATE CIVIL.

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

1920.

September 10.

BALVANT DASO BETGIRI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v. UMABAI HUSBAND SHANKARRAO GODBOLE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS<sup>a</sup>.

*Civil Procedure Code (Act V of 1908), section 47—Instalment award decree—Decree unregistered—Decretal amount charged on the property of the judgment-debtor—Sale of property by judgment-debtor—Subsequent execution of the decree—Property purchased from judgment-debtor sold in execution—Suit by purchaser to set aside sale—Purchaser whether representative of judgment-debtor—Such purchaser not a representative of judgment-debtor if he could prove that he had no knowledge of the charge created by the decree at the time of his purchase—Transfer of Property Act (IV of 1882), section 41.*

In 1891 defendant No. 1 obtained a decree against one Khanderao. The decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment-debtor. The decree was not registered. In 1896, the judgment-debtor sold three of the lands mentioned in the decree to plaintiffs' father and put him in possession. In 1912 defendant No. 1 filed a Darkhast in execution of the decree of 1891 and under that Darkhast lands sold to plaintiffs' father in 1896 were put up to sale. The sale was confirmed by the Collector in spite of the objections put in by the plaintiffs. The plaintiffs, thereupon, sued to set aside the sale. Both the lower Courts dismissed the suit on the ground that the plaintiffs ought to have proceeded under section 47 of the Civil Procedure Code as they were representatives of the judgment-debtors. On appeal to the High Court,

*Held*, remanding the case, that if the plaintiffs could prove that their father was an innocent purchaser having had no knowledge of the charge created by the decree at the time he purchased the property it could not be held that they were the representatives of the judgment-debtor within the meaning of section 47, Civil Procedure Code, 1908, and in that case there was nothing to prevent the plaintiffs from proceeding with the suit.

PER MACLEOD, C. J.:—"If an outsider buys a property of a person who, as far as he can judge, is the ostensible owner and can give him a good title to the property, the mere fact that the ostensible owner is the judgment-debtor cannot possibly make his purchaser his representative within the meaning of section 47 of the Civil Procedure Code."

<sup>a</sup> Second Appeal No. 769 of 1919.

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SECOND appeal against the decision of E. F. Rego, First Class Subordinate Judge, A. P., at Belgaum, confirming the decree passed by B. V. Potdar, Subordinate Judge at Gokak.

Suit to set aside Court sale.

The lands in suit (survey Nos. 45, 47 and 31) formerly belonged to one Khanderao Babasaheb Desai. In 1891 Umabai (defendant No. 1) obtained an award decree against Khanderao. The decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands, including those in suit, of the judgment-debtor. The decree was not registered.

In 1896 the plaintiffs' father purchased from Khanderao Desai the lands in suit and remained in possession of the land since then.

In 1912, defendant No. 1 Umabai applied for execution of the decree by sale of the property charged under the decree. On the 29th April 1915, the plaintiffs applied to the Mamlatdar requesting that the property other than the lands in suit should be sold first; in spite of plaintiffs' objections the suit lands were sold and purchased by defendants Nos. 2 and 3. The sale was confirmed by the Collector. The plaintiffs thereupon sued to set aside the sale contending that the Collector should have referred the matter to the Court and that therefore the sale was illegal.

The defendants contended *inter alia* that the suit was barred under section 47 of the Civil Procedure Code.

The Subordinate Judge held that the plaintiff was a representative of the judgment-debtor to the extent of the property he purchased and therefore the suit was

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barred under section 47 of the Civil Procedure Code :  
*Madho Das v. Ramji Patak*<sup>(1)</sup>.

On appeal the First Class Subordinate Judge agreed with the view expressed by the Subordinate Judge and dismissed the appeal.

The plaintiffs appealed to the High Court.

*Sir Thomas Strangman*, with *A. G. Desai*, for the appellants.

*Bhulabhai Desai*, with *J. G. Rele*, for respondents Nos. 2 to 6.

MACLEOD, C. J. :—In a Suit No. 221 of 1891 filed in the Belgaum Court the 1st defendant in this suit obtained a decree against one Khanderao Babasaheb Desai. That decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment-debtor. The decree was not registered. In 1896, the judgment-debtor sold three of the lands mentioned in the previous suit to the present plaintiffs' father and put him in possession. In 1912 the 1st defendant filed a Darkhast in execution of the decree of 1891, and under that Darkhast certain lands were put up to sale including the lands which had been sold to the plaintiffs' father in 1896. The execution proceedings were transferred to the Collector of Belgaum and that Officer ordered the Mamlatdar of Gokak to sell the lands in accordance with the Court's order. It appears that the plaintiffs' father raised objections to the sale and filed an application that the property other than the three lands sold to the plaintiffs' father in 1896 should be sold first, but in spite of that the sale took place. The plaintiffs' father then applied to the Collector complaining that the Mamlatdar should not have held the sale in the face of his objections. The sale, however, was confirmed by

(1) (1894) 16 All. 286.

the Collector although under the rules the Collector ought to have referred the objections to the Court executing the decree. It has on more than one occasion been held that once an objection has been raised as to a sale, the Collector's powers to confirm the sale are suspended. It is his duty to refer the objecting party to the Court. Until that objection has been dealt with in the proper way the sale cannot be confirmed. However, in this case in spite of the objection the sale was confirmed, and thereafter the plaintiffs filed this suit to set aside the sale which had been held under Darkhast No. 125 of 1912. The suit has been dismissed in both the Courts on the ground that the proper procedure had not been followed, that the plaintiffs were representatives of the judgment-debtor and therefore they were bound to apply to the Court which executed the decree under section 47 for the determination of the question which had arisen between them and the auction purchaser. The learned Appellate Judge came to that conclusion, because he considered that the plaintiffs knew that they had only purchased the equity of redemption from the judgment-debtor, as their father had made an application to the Mamlatdar that the other properties mentioned in the Darkhast should be sold first. But it seems to me that that was not the proper question to be considered. The question was whether in 1896 when the plaintiffs' father purchased the property apparently as a freehold, he knew or ought to have known that he was buying the property subject to the charge created by the decree. I do not think the plaintiffs can in any way be damnified by any application their father may have made to the Mamlatdar at the time the sale proceedings were being held. If an outsider buys a property of a person who, as far as he can judge, is the ostensible owner and can give him a good title to the property, the mere fact that the ostensible owner is a

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judgment-debtor cannot possibly make his purchaser his representative within the meaning of section 47 of the Civil Procedure Code. It may very well be that the ostensible owner has mortgaged the property and there has been a mortgage decree and that therefore all that is left to him is the equity of redemption. But that is not the case here. All that was standing against the judgment-debtor was the few words in the decree to the effect that the decree created a charge on the property, and if the judgment-debtor sold the property to an innocent purchaser, then I cannot see how that purchaser can on those facts be considered a representative of the judgment-debtor, so that if the decree-holder endeavours to execute the decree with reference to the property mentioned in the decree, the purchaser is debarred from proceeding by separate suit and must apply to the Court executing the decree. If there had been no words of charge in the decree, then clearly the purchaser could not possibly be considered as a representative of the judgment-debtor, supposing the decree-holder sought to execute his decree and put up the property which had already been sold for sale in execution. It does not appear to me to make any difference if there are as a matter of fact words in the decree creating a charge of which the first purchaser has no knowledge. But apart from all that it appears to me that both Courts have failed to see that a question of fact had first to be proved in the case before they could dismiss the suit on the ground that the plaintiffs ought to have proceeded under section 47, because if the plaintiffs could prove that they were innocent purchasers, then in my opinion it could not be held that they were representatives of the judgment-debtor. They were entitled, if assailed by the decree-holder or by an auction-purchaser in an execution sale, to resist, and then the question which had to be

decided by a suit was whether they were entitled to remain in possession under their sale deed or whether they should have to give way to the auction-purchaser. It is then the person who is obstructed from getting possession who has to make an application in the first instance to the Court which executed the decree under Order XXI, Rule 97. I do not think that the reverse holds good, so if a person who is in possession desires to get the slander on his title removed, there is nothing to prevent him from filing a suit in a proper Court to do that. I do not see why he should apply to the Court executing the decree.

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In this case, therefore, certain evidence ought to have been taken before the suit could have been dismissed on the grounds mentioned in the judgments of the Courts below, for if the plaintiffs were able to prove that their father was an innocent purchaser who had taken all reasonable precautions before completing his purchase to ascertain whether his vendor had power to make the transfer and that he himself acted in good faith, then it must be that on the merits plaintiffs are entitled to succeed. It does not appear to me to make any difference whether they are representatives of the judgment-debtor or not. If they are, it would be absurd that if it were held that they are entitled to the benefit of section 41 of the Transfer of Property Act, it should nevertheless be decided that they are not entitled to get a decree in this suit, because they ought to have applied under section 47 of the Civil Procedure Code. If, on the other hand, they fail to prove or satisfy the Court that their father had taken reasonable care to ascertain that his vendor had power to make the transfer or that he acted in good faith, then necessarily they must fail and they hold the property subject to the charge created by the decree. But in any event unless the sale had taken place in the proper way they were not bound by the

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sale which was carried out by the Mamlatdar. It appears to me that on a very simple state of facts the proper issues have not been considered by the Courts below and that the best course now to take is to set aside the proceedings in both the Courts and remand the case to the trial Court for decision on the issues :—

(1) Whether the plaintiffs' father purchased the suit lands in 1896 after taking reasonable care to ascertain that his transferor had power to make the transfer and had acted in good faith.

(2) Whether the plaintiffs' father had notice of the charge created by the decree when he purchased the suit lands in 1896?

(3) Whether the judgment-debtor was the ostensible owner of the suit lands with the consent, express or implied, of the decree-holder within the meaning of the words of section 41 of the Transfer of Property Act?

Costs in the trial Court to be costs in the cause. The appellants must get their costs in this Court and in the Court below.

SHAH, J. :—I concur in the order proposed by my Lord the Chief Justice. I desire to add that I am satisfied on the facts of this case that the plaintiffs are not shown to be representatives of the judgment-debtor for the purpose of section 47 of the Civil Procedure Code. It is clear that the real dispute is between the present plaintiffs, who claim to be the full owners and not to be bound by the charge on the property, and the auction-purchasers, who maintain that the plaintiffs purchased the property subject to the charge. In such a case it is difficult to accept the view taken by the lower Courts, that the purchasers from the judgment-debtor in the position of the present plaintiffs, are the representatives of the judgment-debtor and that they are bound to proceed by an

application under section 47 of the Code. The result reached in the lower Courts is due to a certain extent to the form in which the plaintiffs put forward their claim in this suit. I am clearly of opinion that the questions arising between the parties must be ultimately decided in a suit, and may be appropriately decided in this suit. On the merits the issues now suggested by this Court represent the real questions to be determined between the parties. I do not say anything as to what the proper form of relief would be if the issues are decided in favour of the plaintiff. It will be for the trial Court to consider the nature of the relief to be granted in case the plaintiffs are able to establish the case set up by them. As to the merits of the plaintiffs' claim I express no opinion ; nor do I express any opinion as to the effect of the application (Exhibit 56) on the question of fact, which the plaintiffs have to establish.

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*Decree reversed and case remanded.*

J. G. R.

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## APPELLATE CIVIL.

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

GANGADHAR BIN MANIKA AND OTHERS, HEIRS AND LEGAL REPRESENTATIVES OF MANIKA TAI KRISHNA (ORIGINAL OPPONENTS), APPELLANTS  
v. BALKRISHNA SOIROBA KASBEKAR, TRUSTEE OF SHRI MAHADEV TEMPLE OF KADVAD (ORIGINAL APPLICANT), RESPONDENT \*.

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*Indian Limitation Act (IX of 1908), Schedule I, Article 182—Application for ascertainment of mesne profits—Application for execution—Civil Procedure Code (XIV of 1882), sections 211, 212 and 214.*

An application for ascertainment of mesne profits is an application for execution of a decree and is governed by Article 182 of the Limitation Act, 1908.

\* Second Appeals Nos. 638 and 639 of 1919.