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decree was transferred for execution to the district of Faridpore, and application for execution was made to the Subordinate Judge.

The Subordinate Judge has found that, as the proceedings in the Small Cause Court show that, although the two applications for the issue of seal warrants were made more than one year after the passing of the decree, no notices under s. 248 were issued, and as the seal warrants could not be executed, the previous proceedings for execution in this case are all bad and null and execution of the decree is now barred.

We think the Subordinate Judge is wrong. In the first place, we do not know how he finds that no notices under s. 248 were issued. We are told there is no record of the Small Cause Court proceedings, and the Subordinate Judge has only come to this conclusion because the decree-holder is not able to show that any notice under s. 248 was issued. That this was how the Subordinate Judge came to this conclusion appears probable from a portion of his judgment, in which he says: "The proceedings of the Calcutta Small Cause Court do not show the issue of any notice under that section (*i.e.*, s. 248), and the decree-holder did not make any attempt to prove service of such notice. *It may therefore be assumed that no such notice was served or applied for.*"

But it does not appear that it is the duty of a decree-holder under the law to apply for the issue of a notice under s. 248. He has only to apply for execution. It is the duty of the Court in certain circumstances to issue the notice under s. 248. Hence, as there is a presumption, till the contrary is shown, that all legal proceedings are regularly conducted, it does not seem that the Subordinate Judge was justified in making the assumption that he says he has done.

Further, it does not seem to follow that the execution proceedings were bad and null, merely from the facts that they were infructuous and that the seal warrants could not be executed. The decree-holder may have applied in accordance with law for execution, although his applications did not result in the satisfaction of his decree.

[583] The applications for seal warrants appear to us to have been applications in accordance with law for execution or to take steps in aid of execution. We are not aware that it is necessary for the holder of a Small Cause Court decree, when seeking to execute his decree, to do more than apply for the issue of a seal warrant for the attachment and sale of his debtor's property. In any case, such applications would certainly seem to us to be applications made in accordance with law to take steps in aid of execution. We accordingly hold that the execution of the decree in this case is not barred. We therefore allow this appeal, set aside the order of the Subordinate Judge, and direct that execution of the decree do now proceed. This order carries costs.

Appeal allowed.

29. C. 583.

Before Mr. Justice Brett and Mr. Justice Mitra.

BALDEO SONAR *v.* MOBARAK ALI KHAN.*

[26th February and 3rd March, 1902.]

Hindu law—Joint family—Mitakshara—Manager—Debt contracted by a Manager for trading business of the family—Decree against managing member only—

* Appeal from Appellate Decree No. 2216 of 1899, against the decree of Babu Dwarknath Buttacharjee, Subordinate Judge of Shahabad, dated the 14th of June, 1899, reversing the decree of Maulvi Ali Mahomed, Munsiff of Sasseram, dated the 6th of October, 1898.

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Sale of joint family property in execution of such decree, effect of—Liability of other members not parties to the decree.

A member of a joint Hindu family, not being a son of the debtor, would be bound by a decree and sale of the family property under the decree, although he was not a party to it, if the creditor or the purchaser, as the case may be, could prove that the debt had been contracted for the benefit of the family or the purposes of a trading business in which they were interested, and if the decree was substantially one against them, although in form it might be against the head member or members of the family, who contracted the debt.

This would especially be so, if the other co-parceners were minors at the time the debt was contracted and the suit was brought.

THE plaintiffs, Baldeo Sonar and others, appealed to the High Court.

[584] The suit was brought for confirmation of possession in respect of a house upon determination of the plaintiffs' right thereto.

The plaintiffs alleged that Mewa Sonar and Siva Sonar were two brothers; that the plaintiff No. 1 and the defendant No. 2 were the sons, and the plaintiff No. 2 was the widow of Mewa Sonar; that the plaintiff No. 3 was the son of the defendant No. 2, and that the defendant No. 3 was the son of Siva Sonar; that by means of partition the plaintiffs and the defendant No. 2 got the northern portion of the house in dispute, and the defendant No. 3 got the southern portion thereof; and that the defendant No. 1 in execution of a collusive decree against the defendants Nos. 2 and 3 caused the entire house to be sold and himself purchased it.

The defendant No. 1 denied the alleged partition, and contended that the plaintiffs and defendants Nos. 2 and 3, being members of a joint Mitakshara family, and the debt having been contracted for the purposes of a trading business, by which the family were benefited, the decree and the sale thereunder were binding on the plaintiffs, although they were not parties thereto. The Munsif held that the share of the plaintiff No. 1 did not pass to the defendant No. 1 by the sale, and accordingly decreed the suit in part, declaring the title of the plaintiff No. 1 over half of the northern part of the house.

On appeal by the defendant No. 1, the Subordinate Judge found on the evidence that the house in suit was undivided; that the debt was contracted for the purposes of the joint family, and that accordingly the sale passed the entire house to the defendant No. 1. The appeal was accordingly decreed and the suit dismissed.

Babu *Lachmi Narain Singh* for the appellants.

Moulvi *Abdul Jawad* for the respondents.

BRETT AND MITRA, JJ.—In execution of a simple money decree against defendants Nos. 2 and 3, the property in dispute was sold and was purchased by the decree-holder, defendant No. 1. The family of the judgment-debtor, which is governed by the Mitakshara Law, consisted at the date of sale of the **[585]** plaintiffs and defendants Nos. 2 and 3; plaintiff No. 1, Baldeo Sonar, being a brother, plaintiff No. 2, Mussamut Dukhi Koer, the mother, and plaintiff No. 3, Jugdeo, the son of the judgment-debtor, defendant No. 2. Defendant No. 3 is a cousin of defendant No. 2. The plaintiffs pleaded a partition of the house between themselves and defendant No. 2 on one side and defendant No. 3 on the other, and that the debt for which the sale had taken place was not binding upon them, as they were no parties to it. They had also not been made parties in the suit in which the decree was obtained against defendants Nos. 2 and 3. It appears that plaintiff No. 1, Baldeo, was a minor at the date of sale. The Munsiff held that the family was divided as alleged by the plaintiffs, and that there had been a partition

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of the house, the northern portion having been allotted to the plaintiffs and defendant No. 2 and the southern portion to defendant No. 3. He further held that the sale was good as against defendants Nos. 2 and 3; and as plaintiff No. 3 was bound to pay his father's debts, he could not question the sale, unless it was shown that the debt covered by the decree under which the sale had taken place had been incurred for immoral purposes, but that was not shown in the case. He held that plaintiff No. 2, the mother, was not entitled to any share, until there was a partition amongst her sons. But as to plaintiff No. 1, he found that the debt was not shown to be of such a nature as to bind him. The Munsiff, therefore, dismissed the suit of the plaintiffs other than plaintiff No. 1, and gave him a decree for a half share of the northern half of the house, confirming his possession to that extent.

Defendant No. 1 alone appealed, and on his appeal the Subordinate Judge held that there had been no partition of the house as pleaded by the plaintiffs; that the transactions of the plaintiffs and defendants Nos. 2 and 3 were joint; that the debt in question was valid; and that the sale relied upon by defendant No. 1 was binding on all the plaintiffs. As a consequence of these findings, the entire suit was dismissed with costs.

Plaintiff No. 1 (Baldeo) has appealed to this Court, and it has been contended for him that he was not bound by the decree and [586] the sale thereunder, as he was not a party thereto, and that, even if he was bound, notwithstanding that he had not been a party, the findings of fact arrived at by the Subordinate Judge were not sufficient for the disposal of the case.

The question how far a person, who is a member of a joint Hindu family, may be bound by a decree and a sale thereunder of the family property, though he is not a party, has often been discussed; and though there was some difference of opinion in the earlier cases, the later cases seem definitely to establish that he may be so bound. As regards the sons of the judgment-debtors, they are certainly bound, unless the debt be proved by them to have been for immoral purposes. As regards other co-parceners, they also would be bound, if the creditor or the purchaser, as the case may be, could prove that the debt had been contracted for their benefit or the purposes of a trading business in which they were interested, and if the decree was substantially one against them, though in form it might be against the head member or members of the family. This would be especially so, if the other co-parceners were minors at the time the debt was contracted and the suit was brought. The earlier decisions of the High Court at Bombay relied on by the learned vakeel for the appellant were overruled in *Hari Vithal* v. *Jairam Vithal* (1); and in *Sakharam* v. *Devji* (2) it was held that other members of the family, though no parties to the suit on a debt contracted for family purposes, were bound by a decree passed against the managing members and sale thereunder. This view of the law has always been taken in this Court, and we may refer to *Sheo Pershad Singh* v. *Saheb Lal* (3) as the last of a series of reported cases dealing with the question.

In the present case the creditor (defendant No. 1) has been found to have advanced money for a joint-trading business of the family, and the case of *Daulat Ram* v. *Mehr Chand* (4) is exactly in point. The plaintiffs

(1) (1890) I.L.R. 14 Bom. 597.
(2) (1898) I.L.R. 23 Bom. 372.
(3) (1892) I.L.R. 20 Cal. 458.
(4) (1887) I. L. R. 15 Cal. 70; L. R. 14 I. A. 187.

and defendant No. 2 are admittedly members of a joint family, and defendant No. 2 [587] was the managing member along with defendant No. 3. The plaintiff's allegation of a previous partition has been found to be false. The Subordinate Judge has also found that the debt was valid, that is, that it was contracted for the necessities of the family. The sale certificate relied on by the purchaser (defendant No. 1) shows that what was sold was the entire property and not merely a share. We think, therefore, the conclusion arrived at by the Subordinate Judge is right, and this appeal should be dismissed with costs.

Appeal dismissed.

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29 C. 587.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

BOISOGOMOFF *v.* NAHAPIET JUTE COMPANY.* [20th June, 1901.]

Warranty, breach of—Sample—Jute—Examination—Proof of inferiority of quality—Opportunity of examining the bulk—Mode of examining sample.

There may be cases in which the Court would be justified in drawing an inference as to the quality of the bulk from the quality of the sample, *e.g.*, in a case in which the plaintiff had no opportunity of examining and testing the bulk, but the Court would not condemn the bulk as of inferior quality on proof of the inferiority of a sample, if the plaintiff had the opportunity of examining the bulk, but adduces no evidence to prove its quality.

In examining a certain number of bales of goods taken as a sample the entire quantity in each bale and not merely a portion should be examined. It is not proper to examine a portion merely of each such bale and to assume that the residue would be of similar quality to the portion examined, and this is particularly so when the examination of the sample is by a trade custom to be the test of the quality of the bulk.

THIS suit was instituted for the recovery of damages for alleged breach of warranty in respect of certain bales of jute sold and [588] delivered by the defendant company to the plaintiff. The facts of the case appear fully from the judgment.

Mr. *Sinha* and Mr. *Knight* for the plaintiff.

Mr. *Garth* and Mr. *J. G. Woodroffe* for the defendant company.

STANLEY, J. This is an action to recover damages for alleged breach of warranty. The pleadings are very simple and the evidence has been meagre. The plaintiff, who is a jute merchant in Calcutta, purchased from the defendant company in the end of September and beginning of October 1900 three lots of jute, containing in the aggregate 7,000 bales. According to the contracts the jute was to be of the standard quality of the mark known as T. S. N. Twos only. This mark is guaranteed to contain 40 per cent. of hessian warp. In the early part of November the jute in respect of which the dispute has arisen was delivered in Calcutta in the flats *Gorai* and *Khargosh* and consisted of 6,000 bales.

Upon examination of the jute the plaintiff complained to the defendant company that it was not equal to the standard quality of the mark. The defendant company thereupon sent a Mr. Emin to examine the jute, but the plaintiff's press-house manager would not allow the coolies and assorters to open the bales. The plaintiff explains the cause of this

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* Original Civil Suit No. 4 of 1901.

(1) This case is published *in extenso* at the request of Stanley, J. See Appeal from Original Civil p. 323.