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31 C. 253=7 C. W. N. 135.

Sahai (1) a promissory note given by one of them alone for goods apparently supplied to the estate. The question is whether the estate can be made liable. I do not think it can. I refer only to two cases, the case of *Farhall* v. *Farhall* (1) where Sir George Mellish says :—" It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator"; and the same principle was laid down in the case before the Privy Council of *Labouchere* v. *Tupper* (2).

The appeal must be allowed in favour of the present appellants, but the decree of the lower Court will stand as against the executor who gave the promissory note—the defendant No. 1, Bipin Behary Chowdhry.

This case was before the Court a short time back, and it stood over in order that the defendant No. 1 might be served with notice of the appeal. It has been served, but he does not appear. The appellants are entitled to costs in all the Courts.

GEIDT, J. I concur.

Appeal allowed.

31 C. 256 (=31 I. A. 52=8 C. W. N. 649.)

[256] PRIVY COUNCIL.

BAGESWARI PROSAD SINGH *v.* MAHOMED GOWHAR ALI KHAN.

[*On appeal from the High Court at Fort William in Bengal.*]

[12th November, 1903.]

Sale for arrears of Revenue—Act (XI of 1859,) *ss.* 5, 31, 33—*Bengal Act (VII of* 1868,) *s. 1—"Malikana"—" Land Revenue "—Sale for arrears accruing subsequently to notification of sale—Point not taken in Court below, or before Commissioner.*

Malikana comes under the definition of " Land Revenue "given in s. 2 of Act XI of 1859 and s. 1 of Bengal Act VII of 1868. The Revenue authorities are entitled to calculate them together ; and where part of the arrears for which a sale takes place under Act XI of 1859 is malikana, no separate notice under s. 5 of the Act in respect of such portion is necessary.

A sale for arrears of revenue is not necessarily bad because it was held not only for arrears specified in the notice under s. 5 of Act XI of of 1859, but also for arrears that accrued subsequently. Where it appeared that the Collector had acted under s. 31 of the Act, and that the objection to the sale had not been taken either in the Court below or before the Commissioner, and therefore could not, under s. 33, be taken on appeal the objection was not sustained.

Under the circumstances the High Court held that there had been no irregularity in the sale, and the judgment of the High Court was upheld by the Judicial Committee.

[**Foll.** 10 C. W. N. 137=2 C. L. J. 325 ; **Ref.** 11 C. W. N. 1107=6 C. L. J. 99 ; 19 C. W. N. 1129.]

APPEAL from a judgment and decree (11th July, 1899) of the High Court at Calcutta, reversing a decree (22nd March, 1897) of the Subordinate Judge of Monghyr and dismissing the appellants' suit with costs.

The plaintiffs appealed to His Majesty in Council.

The suit was brought on 11th September, 1895 by the three sons of the late Maharaj Kumar Babu Har Pershad Singh against 17 defendants, of whom the 1st, Khaja Mahomed Gowhar Ali Khan, was the

* *Present* : Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1871) L. R. 7 Ch. 123. (2) (1857) 11 Moo. P. C. C. 198.

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substantial defendant, the others being persons in the same interest as the plaintiffs who were joined as *pro forma* [257] defendants because they declined to join in the suit. The object of the suit was to set aside the sale of certain shares in four mouzahs Sonahye, Madwa, Dhad, and Padmawat in which the plaintiffs and the *pro forma* defendants had a proprietary interest, and which were purchased by that first defendant on 24th September 1894, at a sale for arrears of revenue.

The plaint alleged that the four mouzahs which formed part of the mehal of Bisthazari were separated from it and assessed at an annual revenue of Rs. 548-3 ; that of this separated portion the father of the plaintiffs purchased the whole of Padmawat, and a portion of Madwa, the remainder being the property of the *pro forma* defendants ; that on 24th September 1894 the entire separated portion was sold on account of Rs. 656 being arrears of revenue up to June 1894, and was purchased by the first defendant for Rs. 13,250 ; that against this sale petitions were presented by the plaintiffs' father and some of the defendants to the Commissioner of Bhagalpur, but they were rejected on 14th May 1895, on the report of the Collector of Monghyr, and the sale was confirmed.

The grounds on which it was alleged that the sale should be set aside were namely as follows :—

1. That notices which were necessary under ss. 5, 6 and 7 of Act XI of 1859 were irregular in form and were not properly served.

2. That the property was at the time of sale under attachment by the Civil Court, and that the Collector had issued an order on 23rd July 1894 exempting it from sale on that account.

3. That the price was inadequate, the real value of the property sold being Rs. 36,000, such inadequacy of price being caused by the irregularities complained of.

4. That although the division of Bisthazari actually sold was in arrears, there was a surplus in the possession of Government upon the whole mehal which covered the arrears, and therefore the sale was illegal.

The written statement of the first defendant consisted of a specific denial of the irregularities complained of, and of any inadequacy of price resulting therefrom.

Issues were fixed which raised the points in dispute.

The Subordinate Judge held that the alleged irregularities existed and were sufficient to account for the inadequacy of the price realized at the sale. He therefore made a decree in favour of the plaintiffs.

[258] The first defendant appealed to the High Court, and on 11th July 1899, a Division Bench of the Court (RAMPINI and PRATT, JJ.) set aside the decree of the Subordinate Judge. Their judgment was as follows :—

" The suit relates to the sale of an estate for arrears of Government revenue, which took place on 24th September, 1894. The plaintiffs' case is that the sale is void on the ground of irregularity in publishing the sale, and the Subordinate Judge has found that the sale was void upon this ground and has given the plaintiffs a decree.

" The irregularities in connection with the sale which have been found by the Subordinate Judge to have taken place are, first, that the notice issued under s. 5, Act XI of 1859, was not a good notice, and was not in accordance with law ; second, that the notice was not duly served ; and third, that the estate in question was under attachment of the Civil Court at the time of the sale, and therefore under an order of the Collector of Monghyr, dated the 23rd July 1894, the estate in question should have been exempted from sale. Having found these irregularities, and

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having come to the conclusion that the estate was sold for less than its value, he decreed the suit. The defendant, who is the auction-purchaser, now appeals, and on his behalf it is urged by Mr. O'Kinealy that, in the first place, no notice under s. 5, Act XI of 1859, was necessary; second, that that notice, if necessary, was a good notice; third, that it was duly served; and fourth, that at the time of the sale, the property was not under attachment by the Civil Court, and therefore, that this property was not exempted by the Collector from sale.

"Now, the learned Subordinate Judge seems to have held that a notice under s. 5, Act XI of 1859, was necessary in this case, because, he says, part of the arrears due on the estate in question were due on account of malikana, and that the arrears were not due on account of land revenue only, and that, therefore, under clause 4, s. 5 of Act XI of 1859, a notice was necessary, secondly, he says that as the property was attached by the Civil Court, a notice was necessary under clause 3 of s 5, of Act XI of 1859; and the learned pleader, who appears for the respondent, also urges that a notice was necessary under the first clause of s. 5.

"We think there is no force in these contentions; and that, under the circumstances of the case, no notice is required by s. 5."

"In the first place, it is quite clear that, as regards revenue, there is no difference between land revenue and malikana. The kabuliyat executed by the proprietor of the estate in this case shows that he was bound to pay malikana as well as land revenue, and that he was bound to pay both to the Government, and that he was bound to pay both at the same time and in the same kists."

"Under these circumstances, we think that malikana is clearly to be classified as land revenue and dealt with as such. But the provisions of s. 2 of Act XI of 1859, and s. 1 of Bengal Act VII of 1868, place the matter beyond a doubt. It is perfectly clear that under the provisions of these two sections, to which we have referred, malikana does come under the definition of land revenue therein given; and, therefore, it cannot be said, as the Subordinate Judge has said that malikana is different from land revenue and that so a notice was necessary under s. 5.

[259] "Then, with regard to the third clause of that section, we think it is certain that the property at the time of the issue of the notice was not under attachment of the Civil Court. The notice issued under s. 5, no doubt, states in column 10 of the return, that the property is attached by order of the Civil Court for Rs. 588-14-11. This is evidently a mistake. Rupees 588-14-11 is not any amount due under a decree of the Civil Court. It is the amount due for arrears of Government demand, as is apparent from the evidence of the witness Bajrangi Sahai.

"Then it is apparent from several documents filed in this case that at the time of the issue of this notice there was no attachment. The property had been previously attached in 1891. That attachment was withdrawn on the 8th August 1891, as will be seen from the certified extract from order sheet in execution case No. 7 of 1891 to be found at page 86 of the paper book.

"Then there is a register of attachments kept in the Collectorate, and it is clear from this register that there was no attachment then on the property in question. It was attached subsequently for a sum of Rs. 22, *viz.*, on the 26th August, 1894, as will be seen from the return of attachments printed at page 34 of the paper-book; but this cannot invalidate the notice issued under s. 5, as it was subsequent and not prior to the attachment: see *Nownit Lal* v. *Radha Kristo Bhuttacharjee* (1).

"The third point is, that the arrears were due not only for the current year and the year immediately preceding, but for the previous year, *viz.*, for the year 1892; and on this point the learned pleader for the respondent relied upon the evidence of Bajrangi Sahai. It certainly appears from the evidence of this witness that if the malikana be calculated alone, there were arrears for the year 1892 due on the date of the issue of this notice; but it is not necessary that malikana should be calculated separately from land revenue. The revenue authorities are entitled to calculate both together, and that being so, it is evident that on the date of the issue of the notice, there could not have been more than one year's demand due. The Government demand for the share of the estate in question sold was Rs. 548-8-8, as mentioned in the plaint and in the notice issued under s. 5; and as the arrear that was then due was only Rs. 529, it is evident that the amount due was less than one year's rent.

"For all these reasons we think that no notice under s. 5, Act XI of 1859, was necessary, and that this contention of the plaintiff falls to the ground. It is, therefore, superfluous for us to enter into the other objections raised to the notice, but we

(1) (1895) I. L. R. 22 Cal. 738.

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may say that, in our opinion, there is no ground for supposing that the notice was invalid or imperfect. The notice mentioned the nature and amount of the arrear or demand due, and it specified the latest date on which payment would be received and the date on which the property would be sold. We think that, under the circumstances, this was a good notice.

"The learned pleader for the respondent, however, contends that it was not a good notice, because the amount of arrears mentioned in the notice was Rs. 529, which was the arrear due at the end of March; and he says that this notice which was issued on the 15th of May, should have specified the arrears which became due subsequently, and for which the property was ultimately sold.

[260] "We think there is no force in this contention. It was utterly impossible for the Collector, when issuing the notice of 15th May, to include in that notice arrears which had then not accrued, and there is no reason for saying that the notice was bad on this ground.

"We have felt some difficulty in this case as to whether the Collector was justified in selling the property on 24th September for subsequent arrears as well as for the arrears mentioned in the notice. It appears that he sold the property for Rs. 656, whereas he specified in the notice that the arrears due were Rs. 529. We think, however, that there is no ground for supposing that this vitiates the sale.

"In the first place, the Collector seems to have acted under s. 31, Act XI of 1859; and, in the second place, this point was not taken either in the Court below or before the Commissioner, and therefore cannot be taken under s. 33 of the Act; and, thirdly, there appears to be no authority for holding that a sale is bad because the sale was held for arrears that subsequently accrued due as well as for the arrears specified in the notice issued under s. 5. Then as to the service of notice, we do not agree with the learned Subordinate Judge in holding that the service has not been proved. We think service has been fully proved by the evidence of the witness Kharakdhari Singh and by the returns of the service. No doubt there is evidence adduced by the plaintiff to show that there was no such person as Chetu Ali, who, as Kharakdhari says, assisted him as chowkidar in serving the notice. But we think the evidence for the plaintiff is not to be relied upon. We believe the witnesses, who are villagers, are colluding with the old proprietor to defeat the rights of the new purchaser. However this may be, it is evident that as the appellant in this case has got a certificate of sale from the Collector, therefore under s. 8 of Bengal Act VII of 1868, no objection as to the service of notice can be raised.

"The last point in the case is as to the exemption of the property from sale. The Collector issued no express order, exempting this property from sale, but he issued a general notice stating that estates under attachment by the Civil Court should be exempted from sale. Now, as we have shown before, the property in question was not under attachment by a Civil Court at the time of the issue of the Collector's order, and therefore this order, of exemption could not possibly apply to the estates in question, and it was not exempted from sale. On the whole, we think there was no irregularity in the sale, and the Subordinate Judge was not justified in holding that the inadequacy of price realized at the sale was due to any irregularities.

"For all these reasons we decree the appeal with costs."

On this appeal which was heard *ex parte* (the first respondent, though filing a case, not appearing at the hearing.)

C. W. Arathoon for the appellant contended that there were irregularities in the sale proceedings which vitiated the sale, 1st, the notification of sale, did not sufficiently describe the properties to be sold: *2nd*, the property had been sold for arrears accruing after the notification of sale, and the High Court were in error in holding that the Collector acted rightly under s. 31 of [261] Act XI of 1859 in selling for the subsequent arrears as well as for the old arrears: *3rd*, no notice under s. 5 of Act XI of 1859 had been given in respect of the subsequent arrears: *4th*, the High Court judgment was wrong in deciding that malikana was revenue and was to be similarly treated. The case of *Mahomed Abdul Hai* v. *Gujraj*

(1) (1893) I. L. R. 20 Cal. 826, 832; L. R. 20 I. A. 70.

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was referred to, to show that it could not be presumed that the Collector had acted rightly.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that there is no irregularity in the sale to which this appeal relates, or in the notifications issued in respect of it. All the objections which Mr. Arathoon has placed before their Lordships very fully, and very clearly, are so completely disposed of by the reasons given by the learned Judges of the High Court, that their Lordships are quite satisfied to adopt their judgment. It is not necessary to go through these reasons again.

Their Lordships will, therefore, humbly advise His Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the first respondent—the only respondent who appeared—down to the filing of his case, and the costs of his application for payment thereof.

Appeal dismissed.

Solicitors for the appellants: *Dallimore & Son.*

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31 C. 262 (=31 I. A. 10=8 C. W. N. 146=14 M. L. J. 8=6 Bom. L. R. 1.)

[262] PRIVY COUNCIL.

GANESH DUTT THAKOOR *v.* JEWACH THAKOORAIN.*

[13th, 14th, 15th, 19th, 25th May and 12th November, 1903.]

[*On appeal from the High Court at Fort William in Bengal.*]

Hindu Law—Partition— Evidence of partition—Cesser of commensality—Partition by sons without giving mother a share—Decree altering shares on partition—Permission to sue—Suit for both moveable and immoveable property—Civil Procedure Code (Act XIV of 1882) *s.* 44, *Rule* (*a*)*—Cause of action, identical.*

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive.

Anundee Koonwur v. *Khedoo Lal* (1), followed.

In this case it was held by the Judicial Committee that the evidence in other respects supported the theory that the cesser was adopted with a view to a partition which was eventually completed.

A partition was made between four sons forming a joint family governed by Mitakshara Law, without allotting their mother a share:—

Held, that it not being shown that she consented to relinquish her share, or acquiesced in the partition, the mother was not bound by it.

Krishnabai v. *Khangowda* (2), referred to.

In a suit by the widow of one of the sons for the one-fourth share which had on the partition been allotted to her husband, in which suit all the parties interested were represented:—

Held (varying the decree of the High Court) that the plaintiff was entitled to a one-fifth share only, and that the mother was entitled to have a one-fifth share allotted to her.

Held, further (affirming the decision of the High Court), that s. 44, Rule (*a*) of the Civil Procedure Code (Act XIV of 1882) was not applicable to the suit (one for property, both moveable and immoveable) inasmuch as the cause of action was the same for both kinds of property.

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* *Present*: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1872) 14 Moo. I. A. 412.

(2) (1893) I. L. R. 18 Bom. 197.