Before Mr. Justice Markby and Mr. Justice Mitter.

LUCHMI DAI KOORI (PLAINTIFF) *v.* ASMAN SING AND OTHERS (DEFENDANTS).* 1876 *June 7.*

Hindu Law—Mitakshara—Purchaser at sale in Execution of Decree of Joint Family Property—Usurious Rate of Interest—Form of Decree against Mortgaged Property.

In a suit by a Hindu, subject to the Mitakshara law, against certain auction-purchasers at a sale in execution of a decree against the father, to recover a portion of the ancestral estate by cancellation of the sale, it appeared that the property which was mortgaged by the bond upon which the decree was passed was not put up for sale. The decree provided "that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond," and it also allowed interest at about 50 per cent., the rate in the bond, to the decree-holders. It was contended on behalf of the plaintiff that, upon a proper construction of the Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall* (1), the decree under which the property had been sold was an improper one. *Held* that, under the Privy Council Ruling, the purchaser is not bound to look beyond the decree. *Held* also, that an usurious rate of interest cannot be treated, within the principles of the above case, as showing that the decree was for a debt which the son was not bound to discharge.

Held further, that where a decree is against the mortgagor generally, coupled with a declaration of the lien, the decreeholder may proceed either against the person and his property or against the mortgaged property, though whether such a course will be allowed in any particular case is a matter for the discretion of the Court executing the decree.

SUIT to recover possession of a moiety of a certain estate by cancellation of an auction-sale, held on the 12th of February, 1866.

The material facts alleged in the plaint were as follows:—That the plaintiff, with the defendant Govind Dyal Sing, who was his father, constituted a joint Hindu family living under the Mitakshara law; that the property, which was the subject-matter of the suit, was ancestral property, to which

* Regular Appeal, No. 104 of 1875, against a decree of Baboo Mothooranath Goopta, First Subordinate Judge of Zilla Bhaugulpore, dated the 18th of January, 1875.

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Govind Dyal Sing succeeded in 1846; that the estate was totally unencumbered at that time, and that the income "was not only sufficient for family expenditure, but probably sufficient to ensure a saving;" that the plaintiff was born in the year 1858, when he became entitled to a share in the joint estate; that the defendant Govind Dyal Sing, without any legal necessity, executed a bond in favor of certain bankers of the names of Dungur Mal and Sheo Lall, for Rs. 2,800, mortgaging certain villages other than those sued for; that, subsequently, the mortgagees obtained a decree for the sale of the mortgaged properties, but instead of executing the decree by sale of those properties, they put up for sale the right and interest of the defendant Govind Dyal Sing in the properties for the recovery of a moiety of which the present suit was brought, and at that sale the defendant Asman Sing was the purchaser.

The defendants, in their written statement, stated that the debt in respect of which the property was put up for sale was contracted by the plaintiff's father for the purpose of purchasing, for the benefit of the joint family, a certain share in an estate belonging to one Roghuber Dyal Sing, another member of the family; and that, consequently, the plaintiff was not entitled to question the validity of their purchase in execution of decree for such debt.

That decree was worded in the following terms: "that the claim be decreed; that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond." The interest allowed upon the bond amounted to Rs. 1,630 for a period less than a year in respect of the sum of Rs. 2,800, giving a rate of more than 50 per cent. per annum.

The Subordinate Judge, without in any way going into the facts of the case, held, upon the strength of the Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall* (1), that the decree under which the defendants purchased the property was conclusive, and, as *bonâ fide* purchasers for valuable consideration,

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they were not bound to enquire whether the original debt was for a valid necessity. He, accordingly, dismissed the suit.

The plaintiff appealed to the High Court.

Mr. *Ameer Ali* (Baboo *Mohesh Chunder Chowdry* with him) for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*) (Messrs. *Twidale* and *Sandel* and Munshi *Mohammed Yusooff* with him) for the respondents.

Mr. *Ameer Ali*. — The Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall* (1) does not lay down any such hard and fast rule as the Subordinate Judge supposes. Prior to this decision, the Courts had almost invariably held that the burden of proof lay primarily with the purchaser—*Mahabeer Persad* v. *Ramyad Singh* (2) and *Laljeet Singh* v. *Rajcoomar Singh* (3). The Privy Council Ruling does not do more than simply change the onus and transfer it in the first place to the son. If the plaintiff makes out a *primâ facie* case, and proves sufficiently that the debt for which the property was sold was not for a valid purpose, the same liabilities would attach to the purchasers as before. Every member of a Hindu joint family has an inherent right to question the validity of acts committed by the managing member so as to bind the joint estate—*Hunooman Persaud Panday* v. *Mussamut Babooee Munraj Koonweree* (4). The Privy Council cannot be supposed to mean that whenever such property has passed into the hands of auction-purchasers, such members should be for ever precluded from questioning the validity of not only the original acts but also of the decree and sale under it. No doubt, if the Judicial Committee had stopped at the words, "a purchaser under an execution is surely not bound to go beyond the decree, &c." (5), such construction might have been placed on their ruling; but their Lordships go on and say, "the purchaser under that execution

(1) 14 B. L. R., 187.
(2) 12 B. L. R., 90.
(3) *Id.*, 373.
(4) 6 Moore's I. A., 393.
(5) 14 B. L. R., 199.

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was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them" (1). Some meaning must be attached to those words, and the only reasonable construction that can be given to them is, that, when ancestral property is put up for sale in execution of a decree against the father, the purchaser is not bound to look to the character of the debt, but he is not freed from the burden of examining into the character of the decree, to see whether it is a proper or improper one; and, on the other hand, though the son is debarred from questioning the validity of the acts leading up to the decree, he retains his right to question the propriety of the decree and the subsequent proceedings under it. If this is the correct view, then, upon the face of the decree, it appears the decree-holders were bound to proceed first against the mortgaged properties; and they would have only been entitled to proceed against any other property of the judgment-debtor, in case there happened to be a deficiency. A decree-holder, who takes a decree as against the hypothecated property, should, on equitable principles, be made to exhaust it. The facts proved show that the debt was an immoral one. The following cases were also cited—*Tooke* v. *Hartley* (2), *Perry* v. *Barker* (3), *Budree Lall* v. *Kantee Lall* (4), and *Cheyt Narain Sing* v. *Bunwari Singh* (5).

Baboo *Mohesh Chunder Chowdry* on the same side.—Upon the face of the decree it appears that interest over 50 per cent. per annum was claimed by and allowed to the decree-holder. It is usurious; and, as usury is prohibited by the Hindu law, the decree is an improper one; Cowell's Lectures on Hindu Law for 1871, pp. 307, 311.

The *Advocate-General* for the respondents.—The plaintiff is concluded by the Privy Council Ruling from questioning the validity of his father's acts when once a decree has been passed

(1) 14 B. L. R., 200.
(2) 2 Bro. Ch. C., 125.
(3) 8 Ves., 527.
(4) 23 W. R., 260.
(5) *Id.*, 395, at p. 398.

and the property sold under it. With reference to the propriety of the decree itself, the bond in this case hypothecates not only certain properties, but also makes the person of the debtor responsible for its payment. The decree is in the form usual in the mofussil, under which a decree-holder proceeds either against the mortgaged property or the debtor personally. The decree-holders in this case were, therefore, not bound to exhaust the hypothecated properties. The evidence shows the debt was contracted for a valid purpose—*Muddun Thakoor* v. *Kantoo Lall* (1), *Mussamut Koldeep Kour* v. *Runjeet Singh* (2), and *Gridhari Lall Sahoo* v. *Mussamut Gowrunbutty* (3).

Mr. *Ameer Ali* in reply.

The judgment of the Court was delivered by

MARKBY, J. (who, after stating the facts, continued):—The Subordinate Judge took evidence in the case, but eventually without in any way going into the evidence held upon the strength of a decision of the Privy Council in the case of *Muddun Thakoor* v. *Kantoo Lall* (1), that the decree under which the defendant purchased this property was conclusive in the matter, and that the defendant was not in any way bound to inquire further when this decree was existing.

Against this judgment the plaintiff appeals, and he contends, in the first place, that the Privy Council case relied on does not make the decree conclusive in the way the Subordinate Judge has held it to be; secondly, he contends that upon the evidence he has made out his case that this was a debt for which his interest in the property could not in any way be made liable; and thirdly, he contends that, under the terms of the decree itself, the property which should have been first sold in satisfaction of the decree was the property which had been mortgaged, and that, therefore, applying the Privy Council decision in all its strictness, the purchaser had notice upon the face of the decree that this property could not be sold.

(1) 14 B. L. R., 187. (2) 24 W. R., 231.
(3) 15 B. L. R., 264.

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Now, with regard to the first point, we think that the decision of the Subordinate Judge is right. The case that we have to deal with here is, for all material purposes, precisely the same as that which was dealt with by the Privy Council—in what is called the "second appeal" in the case referred to—the appeal of Muddun Mohun Thakoor, whose position was precisely that of the present defendants. The Privy Council say, speaking of the purchaser in that case:—"He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favor of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and, therefore, it appears to their Lordships that he was perfectly justified within the principle of the case of *Hunooman Persaud Panday* v. *Mussamut Babooee Munraj Koonweree* (1) in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate."

Here also there had been a decree of a Court of Justice against the father for this money, and an order of the Court that this property should be put up for sale.

Then their Lordships quote a well-known passage from the case referred to (2), and then they say as follows:—"The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them" (3).

(1) 6 Moore's I. A., 393. (2) *Id.*, 423. (3) 14 B. L. R., 199, 200.

Now it is contended upon those last words, that the intention of the Privy Council was that a purchaser at an execution sale should not only see that there was a decree, but that a decree had been rightly given against the judgment-debtor. That would be really unsaying all that the Privy Council had just before said upon the matter. What we think the Privy Council mean by those words is, that a party is not bound to look beyond the decree to see that that was a right decree, for they had said already just the contrary that he was not bound to do so, but he was bound to look to the decree to see that in point of form it was a proper decree. Then that being so, no objection can be taken in point of form to this decree, except the one which was taken by Baboo Mohesh Chunder Chowdry with which we have to deal now.

He contends that, even giving the Privy Council decision that interpretation, the purchaser was not bound in any way to go behind the decree to see what occurred prior thereto, still he was bound to look to the decree itself and as it stands; there was notice to him on the face of the decree that this was a debt which, under the Mitakshara law, the son was not liable to discharge, and for this reason, because it appears upon the face of the decree, that the interest, which was allowed upon this bond, amounts to somewhere about Rs. 1,600 for a period less than a year in respect of a principal of Rs. 2,800, giving a rate of interest somewhere over 50 per cent.

But, even assuming that the Hindu law contains a prohibition against the taking of interest at so high a rate, and that by the Hindu law interest at that rate could not under any circumstances be allowed, still we think that that is not a circumstance which within the principles laid down by the Privy Council in the case quoted above, can be treated as showing that this was a decree for a debt which the son was not bound to discharge. For that purpose, we must look into what the cases under the Mitakshara law are in which he is not bound to discharge the father's debt. That is expressed by the Privy Council in these words :—

"It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money

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by the sale of the property in question" (1). Now all we know, and all we can know, is what appears on the face of the decree itself. Their Lordships go on to say:—"If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which have come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money upon which an action was brought" (1).

Can we say here upon the face of the decree, that, so far as it orders interest to be paid, it is a decree for an immoral purpose? One might almost say that such a question answers itself. It may be that, under Hindu law, there were some restrictions against the allowance of interest; but it is well known that those restrictions are no longer enforced by our Courts. There is no ground whatever for saying that what our Courts allow in the shape of interest is money directed to be paid for immoral purposes. Therefore, upon that ground, it appears to us impossible to say, that, on the face of the decree, it was one for a debt which the son was not bound to discharge.

This view of the case renders it unnecessary to consider the facts of this case; but, having heard the case very ably argued on behalf of the appellant, we think even upon the facts of the case that this was a debt which the son was bound to discharge.

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Therefore, upon the evidence, if one was at liberty to go into the evidence, we should hold that the debt was one which, under the Mitakshara law, the son was bound to discharge.

Then the other question remains, namely, as to the form of the decree. Now we had the decree read to us, and we consider this to be not such a decree as we know is sometimes made, namely, a decree restricting the parties in the first instance to the sale of the mortgaged property. But it is a decree against the mortgagor generally coupled with what is

(1) 14 B. L. R., 197.

called a declaration of the lien—a declaration which it is exceedingly common to insert in decrees against mortgagors upon a bond of this nature. The bond also, as has been pointed out by Mr. Advocate-General, was not only a bond pledging the property, but a bond which made the party personally liable for the money. Now, upon a decree of that kind, we have no hesitation in holding that a person may in law proceed either against the person or against the mortgaged property specified in the decree. In saying that we do not at all mean to say that that is a course which in all cases ought to be allowed. There are undoubtedly cases in which that would operate greatly to the injury of the mortgagor. And we desire to say nothing which would in any way interfere with the discretion of the Court executing the decree to take such precaution as might be necessary against any injury of that kind. But we think that in the present suit no inquiry upon such a subject as that can take place. I have already quoted the passage from the Privy Council judgment, which points out the duty of a purchaser at an execution sale in such a case as this. We think that, under the law as there laid down, the purchaser had a right to assume that the property, which was sold at this sale, was liable to be sold under this decree, and that any questions which the judgment-debtor might have raised or did raise upon the order by which the property was brought to sale, were disposed of at the time when the sale was ordered to take place. Therefore whatever may be the judgment-debtor's right under such a decree as this, that question cannot be raised now as against the person who has purchased at a sale under a decree of Court. Therefore that ground also fails.

The result is that the regular appeal must be dismissed with costs.

Appeal dismissed.