(1933) 09 BOM CK 0015

Bombay High Court

Case No: First Appeal No"s. 307 and 479 of 1928

Chidambargauda Ramchandragauda Desai		APPELLANT
	Vs	
Channappa Mahalingappa Channappa Mahalingappa Vs Chidambargauda Ramchandragauda Desai		RESPONDENT

Date of Decision: Sept. 18, 1933

Acts Referred:

- Limitation Act, 1908 - Section 14

Citation: AIR 1934 Bom 329 : (1934) 36 BOMLR 694

Hon'ble Judges: N.J. Wadia, J; Baker, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Baker, J.

Although the record of this group of appeals is voluminous, there are only three points for decision. There is no dispute as regards the main facts, which are briefly as follows. The plaintiffs in the main suit, No. 437 of 1923, from which F. A. Nos. 307 and 479 of 1928 arise, are auction-purchasers of the interests of the first two branches of the Bahadur Desai family of Agadi in the Karasgi taluka of the Dharwar district represented by defendants Nos. 1 to 12. Defendants Nos. 13 to 15 are the representatives of the mortgagees under Exh. 200 of 1870. They say that the mortgage was finally paid off in 1918-19. They are merely pro forma defendants. The remaining defendants are other auction-purchasers. The contending defendants are Nos. 1 to 3 representing the first

branch of the Desai family.

2. In 1791 A.D. the Peshva granted the village of Agadi to Lingangauda, ancestor of defendants Nos. 1 to 12, in consideration of his having been deprived of his watan by Tippoo, who overran the Carnatic towards the close of the eighteenth century. There were four main branches of Lingangauda''s descendants, and in 1857 there was an award between them, subsequent to which they held as tenants-in-common, as the property was not divided by metes and bounds.

3. The management of the village was in the hands of the two elder branches, and in 1870 Hanmantgauda and Basangauda, the representatives of the two elder branches, mortgaged their share to the ancestors of defendants Nos. 13 to 15, who were jahagirdars of a village in Dharwar but resided at Cawnpore. This mortgage is Exh. 200, dated October 25, 1870, for Rs. 60,000, and was a possessory mortgage for forty-one years to be paid off by annual instalments. The estate is a very large one for this part of the country, and possession was given by making the tenants attorn to the mortgagees who were represented by a local agent

4. The mortgage would normally have expired in 1911, though there is a clause in it that if the collections in any year fall short of Rs. 1,500, the mortgagees should remain in possession till the deficit was made up. The net share of the mortgagors in the revenues of the village was Rs. 1,915, and the surplus was to be paid back to them. The mortgagors did not act Up to the agreement, and after some prior litigation, which is not material for the purpose of the case, the mortgagees brought suit No. 19 of 1892 to recover the mortgage money by sale. The mortgagors raised numerous contentions, amongst others, that the mortgage was only of the revenue and not of the land. This was found against them, and a decree was passed for Rs. 36,000 on January 31, 1895, Exhts. 145 and 172. Against this the mortgagors appealedï¿½F. A. No. 90 of 1895, decided by the High Court on March 30, 1896, Exh. 147, p. 177. A large part of the arguments of this appeal has turned on the construction of the High Court''s judgment and decree which confirmed the decree of the first Court with an important variation, for by this decree the defendants-mortgagors were given the option of handing over land yielding Rs. 1,600 per annum (Rs. 1,500 plus Rs. 100 for the pay of a karkun) to the mortgagees, within three months and in default the property was to be sold. The mortgagors availed themselves of this option, and handed over about one hundred and fifty lands to the mortgagees. The mortgagees remained in possession till 1918-19, and the mortgage is now admittedly paid off, and defendants Nos. 13 to 15 have no contentions to raise. They were made parties because the plaintiffs were not sure whether they still asserted any claim against the property. As they did not, they need not be considered in the present appeal. The plaintiffs, as already stated, are purchasers at various auction sales from 1877-78 held in execution of money decrees obtained against the shares of branches A and B. They are strangers and mostly members of the Nelvigi family. Their position as auction-purchasers is not now disputed. They never took possession, and the present suits are brought for possession of their shares in 1923.

They were not parties to the mortgage suit in 1892, but they were parties to the partition suit in 1908.

5. In 1908 there was a partition suit brought by the members of the third branch against the other branches, to which the mortgagees and the auction-purchasers were made parties, suit No. 208 of 1908 ; the plaint is at p. 106. There were five plaintiffs of the third branch. Defendants Nos. 1 to 3 were representatives of the first branch, defendant No. 4, of the second branch, and defendant No. 5, of the fourth branch. Defendants Nos. 6 to 8 were the Cawnpore mortgagees, and defendants No. 9 onwards were the auction-purchasers including the plaintiffs in the present suit. Defendant No. 11 is the auction-purchaser in Section A. No. 829 of 1927. The present plaintiffs appeared and put in a written statement which will be gone into later on. The partition suit was of formidable dimensions, and the judgment (Exh. 132) covers over fifty pages. There were sixty issues, of which we are only concerned with three. The suit was finally decided on October 11, 1919, eleven years after institution. A preliminary decree was passed for partition on September 28, 1917, p. 101. There was no appeal to the High Court. The result was that the share of the third branch of the plaintiffs in the suit was separated and the others left undivided.

6. The present suit was brought in 1923 by representatives of some of the auction-purchasers for possession of the land purchased by them in 1877-78 in execution of decrees against the first branch. The suit was decreed by the lower Court. Defendants Nos. 1 to 3, the representatives of the first branch, appeal.

7. There is no dispute as to the facts detailed above. Only three points arise in the appeals, (1) limitation, (2) res judicata, (3) whether the village is alienable beyond the lifetime of the alienors, that is, whether it is a life estate. The appeal has been elaborately argued at great length, but the rnain contentions on either side can be put comparatively shortly.

8. I will deal first with the shortest of the three points, whether the village is alienable beyond the lifetime of the alienor or whether only a life estate was granted in it. It has been observed that the village was mortgaged in 1870 for forty-one years, and portions of it were sold in 1877 and 1878, apparently without objection. In the mortgage suit of 1892 the plea that the village was not alienable beyond the life of the alienor was raised as issue No. 7, p. 170, but one of the original mortgagors being alive, he was held estopped from raising this contention. The contention that the village is not alienable beyond the lifetime of the alienor, the grant being only a life estate, is based on the order of the Inam Commissioner, Exh. 141, p. 152, dated January 31, 1859, and the Mamlatdar''s order, Exh. 143, p. 155, of September 7, 1919. The Inam Commissioner''s order says that it seems that the intention of the Peshva''s Government was that the said village was to be continued with the grantee for his lifetime, but in the order of Government, No. 6973 of July 5, 1851, it is mentioned that the inam should be continued hereditarily ; hence the village is at present hereditarily enjoyed by the heirs of the body of Lingangauda, grantee

of 1791 A.D., and should be so continued. This clearly shows that the grant was to continue as long as there were lineal descendants of the original grantee. The Mamlatdar"s letter, Exh. 143, p. 155, merely says that the inam is to be continued as long as there is male progeny of the body of the grantee. He is of course only quoting the orders of his superiors. There is no restriction as to alienation. The village is not watan so as to be controlled by the Watan Act, nor is it saranjam involving a resumption and re-grant at the death of each successive holder. It is entered in Government records as personal inam, which is ordinarily alienable, Exh. 144, p. 156. The decision of the Inam Commissioner only regulates the relations between the Inamdar and Government. There are at present male lineal descendants of the original grantee, defendants Nos. 1 to 11, and there is no immediate prospect of the line becoming extinct. What may happen when the male line fails, if it ever does, need not concern us. I can find nothing to suggest that the village is not alienable beyond the lifetime of the alienors, and I agree with the view taken by the learned Subordinate Judge at p. 6 of the print, and this issue must be decided against the appellants. I do not deal here with the point as to whether females can inherit, which does not arise in this appeal.

9. I turn now to the issue of limitation, which is the most important issue in the case. The auction-purchasers purchased as long ago as 1878 during the continuance of the mortgage of 1870, which was for forty-one years. The purchasers were subject to the mortgage, and during the period of that mortgage the auction-purchasers could not: claim possession. But it is contended that in 1892 the mortgagees by their own act put an end to that period by bringing a suit for sale. The High Court decree of March 30, 1896, put an end to the mortgage. From that date the rights of the parties depended not on the contract but on the decree. The mortgage ceased to exist from that date, and the auction-purchasers were entitled to sue for possession, which they did not do. So the present suit brought in 1923 is time-barred under Article 137 of the Indian Limitation Act. The reply is that the High Court decree did not put an end to the mortgage, which continued, and the auction-purchasers could not ask for possession. It is of course admitted that in any case they could not claim possession of the lands handed over to the actual possession of the mortgagee under the High Court decree. There are fifty-six such lands which are included in the present auction-purchasers" purchase, the remaining ninety-seven lands went into the possession of the mortgagors. It was also contended that, as by his written statement on November 27, 1909, in the partition suit of 1908, defendant No. 1 denied the auction-purchases altogether and asserted his adverse possession, limitation would in any case run from that date independent of the High Court decree. There was in that suit actually an issue, No. 27, on. the question of the auction-purchase, which was decided in the auction-purchasers" favour on September 28, 1917. The present suit is within six years of that. The High Court decree, which is Exh. 148, p. 188, is not an ordinary mortgage decree. In the judgment, Exh. 147, at p. 186, the High Court say:

Of course if no sale takes place and plaintiffs continue to be in the management under the terms of the bond they will be entitled to recover the karkun''s salary. It would be in the interest of both the parties that there should be no sale and no enforced partition of plaintiffs'' share.

We would, therefore, provide for alternative relief by first requiring the defendants to place plaintiffs in possession and management of lands yielding Rs. 1,600 per year as rent and authorise the village officers to make the payment therefore of collections made under the Bombay Land Revenue Code 1879 and otherwise direct to the plaintiffs and defendants should not interfere with the possession of these lands. If they fail to do these acts within three months from this date plaintiffs may proceed to the sale of the property and recover Rs. 36,143-4-5.

10. It is contended that this decree put an end to the mortgage, and the rights of the parties are henceforth regulated by the decree, and the relationship of mortgagor and mortgagee ceased to exist. If the mortgagees were deprived of the possession of any of these lands, the right to recover possession would depend on the High Court decree and not on the original mortgage, and in any case there was nothing to prevent the plaintiffs from asserting their claim to the remaining ninety-seven numbers which were free of the mortgage and included in the purchase.

11. The option given by the High Court decree was exercised by the mortgagors. They handed over a large number of lands including fifty-six purchased by the auction-purchasers to the mortgagees. The question is of some difficulty, and out of the numerous cases which have been quoted on either side there are none which apply to the facts of the present case. The last clause in the High Court decree, which might be considered a preliminary decree for sale, became ineffective by reason of the mortgagors handing over the property within three months as directed by the decree. The mortgagees were in possession of the lands so handed over as mortgagees, and were entitled to remain in possession of them until the mortgage was paid off, which was not till 1918. The mortgagees could not, under the High Court decree, after the expiry of three months, ask for sale. The provisions of the original mortgage by which they were entitled to recover Rs. 1,600 per annum from the rents of the village continued to operate. The High Court decree leaves untouched the period during which the mortgagees were to be in possession under the mortgage. The result of the High Court decree, therefore, is not to supersede the morgage but to confirm its terms.

12. In any case the auction-purchasers were not parties to this litigation and cannot be presumed to have notice of it. Though efforts were made to call the present plaintiff as a witness he was never served.

13. The mortgagees under the High Court decree were entitled to the possession of lands yielding Rs. 1,600 per annum. In the event of the lands handed over to them failing to produce the stipulated amount, or of their losing possession of any of them, they would

be entitled to call on the mortgagors to make good the deficiency, and unless and until the mortgage was paid off, which was not till 1918-19, I do not think it can be said that the lands remaining in the possession of the mortgagors could be said to be free of the mortgage, and in these circumstances I hold that adverse possession by the defendants as against the auction-purchasers (plaintiffs) did not begin from the date of the High Court decree in 1896. The learned Counsel for the appellants, however, relies further on the partition suit of 1908 as furnishing a fresh start for limitation (apart from the High Court decree) and it will be necessary to go into the pleadings in that suit in some detail. It is contended that the auction-purchasers were parties to the partition suit of 1908, that by his written statement on November 27, 1909, Exh. 134, p. 131, defendant No. 1 denied the auction-purchase and set up his adverse possession, and so adverse possession will run from that date, and that as the auction-purchasers did not ask for possession in that suit their claim for possession is barred by res judicata. That was a suit by the third branch against the other branches for partition. The third and fourth branches were not parties to the mortgage of 1870. It is not correct to say that the auction-purchasers did not put forward their claim in that suit, as by their written statement, Exh. 135, p. 132, they set up the auction-purchase, and said :

The lands mentioned above and Agadi village were in possessory mortgage to Narayanrao Jahagirdar of Brahmawarta prior to this auction-purchase, and were in his possession and even now he has the right to enjoy the same. Hence on the termination of his mortgage right the members of the family of defendants Nos. 9 and 10 (auction-purchasers) are entitled to get the possession of the property in accordance with the auction sale-certificates. Therefore the plaintiffs and defendants Nos. 1 to 5 (i. e. the members of the Desai family) have no right of ownership at all over the property mentioned in paragraphs 2 to 8. As the defendants Nos. 9 and 10 and members of their family have acquired the rights which the deceased Hanmantgauda and the deceased Basangauda and Chidambargauda (the first two branches of the mortgagors) had in the lands mentioned above, the members of the families of defendants Nos. 9 and 10 shall become the owners of the lands which will be assigned to the joint share of the deceased Hanmantgauda and Chidambargauda and Basangauda at any partition that may take place between the parties under any circumstances. Hence the members of the family of these defendants Nos. 9 and 10 are entitled to get whatever lands that would be ascertained and assigned to the shares of the said persons.

14. I read this as setting up a claim for possession of the purchased lands when they are assigned on partition to the shares of branches 1 and 2. The Subordinate Judge framed issues Nos. 28 to 30 as follows:

(28) Whether the auction-purchaser-defendants purchased the lands stated in their written statement respectively in sales in execution of the decrees against the ancestors of defendants Nos. 1 to 4?

(29) Whether the claim of any of the defendants in regard to the said lands is time-barred? and

(30) What relief, if any, should be granted to the defendants in the general partition?

15. The contending branch A objected to these issues, and asked that they should be deleted. They were, however, retained by an order of March 27, 1911. The case went on for several years after that, and subsequently on December 9, 1913, four years later, the plaintiffs and defendants Nos. 1 to 4, i. e., the branches of the Desai family, presented a purshis, Exh. 422, p. 251, agreeing to certain terms of partition in which they say, paragraph 10:

The contentions in issue No. 28 are between defendants Nos. 1 to 4 (first two branches) on the one hand and defendants Nos. 9 to 11, 14 and 33 (auction-purchasers) on the other, and plaintiffs have consented to keep a ï¿½ share by rnetes in every one of the numbers of the lands referred to in that issue with defendants Nos. 1 to 4, and these lands are in the possession of defendants Nos. 1 to 4 now. Excluding the half share of defendants Nos. 1 to 4 in the aforesaid lands in the remaining half, plaintiffs should take a one-fourth share and defendant No. 5 a ï¿½ share by metes and bounds. So the issues Nos. 28, 29 and 30 should be decided in this way.

16. So the contending defendants ask that these issued should be decided without regard to the rights of the auction-purchasers and ultimately the Subordinate Judge held thatï¿½

Issues Nos. 29 and 30 do not really arise in this case, for it is admitted by defendants (auction-purchasers) that the lands which they purchased at Court sales were in enjoyment of the mortgagees at the date of this suit and at the dates of the written statements of the said defendants. The said defendants have not claimed a partition and awarding possession of their shares in those lands. Issues Nos. 29 and 30 are premature so far as this suit is concerned, and I therefore strike them off. Moreover they are practically the subject of dispute between defendants Nos. 1 to 5 and the above-mentioned defendants themselves with which the plaintiffs have nothing to do.

17. On issue No. 28 he found that the auction-purchases were proved.

18. It would be apparent from this that it was the defendant himself, by whom I mean the contending defendant, who prevented the issue of adverse possession between him and the auction-purchasers being tried, and this being so, it does not seem equitable that he should now be allowed to argue that the adverse possession has become complete because this issue was not decided. It has recently been held by the Privy Council in Kodoth Ambu Nair Vs. Echikan Cherekere Kelu Nair, that a party cannot both approbate and reprobate, and that he cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage. On this principle the defendant cannot be allowed to say at one time that the question

between him and the auction-purchaser as to adverse possession is not necessary to be decided in the suit and thereby induce the Court to refrain from deciding it, and at another time say that because that question was not decided between him and the auction-purchaser, the auction-purchaser''s claim is barred by adverse possession, which is the very issue which he objected to being decided. Even if he is not estopped, the principle of approbation and reprobation will apply, and he cannot be allowed to take this standpoint.

19. The learned Counsel for the respondents has argued that on a liberal. interpretation of Section 14 of the Indian Limitation Act the plaintiffs are entitled to deduct the time occupied in suit No. 208 during which this issue was under trial, and that limitation will only run from the date of the decree in 1917. The question of the title of the auction-purchasers and of adverse possession could only be decided in that suit, as there could not be two simultaneous suits between the same parties on the same points, but the Court had jurisdiction to decide those questions in that suit, and therefore, I think, it is doubtful if Section 14 of the Indian Limitation Act will apply. This, however, is not of great importance in view of the considerations referred to above and the judgment of the Privy Council in Ambu Nair v. Kelu Nair just quoted. I hold, therefore, that the present suit is not barred by limitation.

20. The remaining question is of res judicata. The suit was one for partition between branch No. 3 and branches Nos. 1, 2 and 4 of the family, and there was no decision on the issues regarding adverse possession or the right to possession as between the contending defendants and the auction-purchasers, who were co-defendants in that suit. No relief was asked by the plaintiffs against the auction-purchasers. It must he remembered that the plaintiffs'' branch, No. 3, were not concerned in the mortgage, nor had any portion of their property been sold and purchased by the auction-purchasers. Hence as no relief was asked for or granted as against the auction-purchasers in the former suit, though they were parties to it, there will not be any question of res judicata under the ruling in Ramdas v. Vazirsaheb ILR (1901) Bom. 589 : 3 Bom. L.R. 179 In (1931) ILR 53 103 (Privy Council) it is held that a decision operates as res judicata between co-defendants provided that (1) there was a conflict of interest between them, (2) it was necessary to decide that conflict in order to give the plaintiff the relief which he claimed, (3) the question between the co-defendants was finally decided. The latter two of these conditions are not fulfilled in the present case, because it was not necessary to decide the questions between the auction-purchasers and the first branch in order to give the plaintiffs in the partition suit the relief which they sought, and the question between the co-defendants was not finally decided. That the matter must have been heard and finally decided in order to constitute res judicata has been held by this Court in Abdullakhan v. Khanmia ILR (1908) Bom. 315 : L.R. 26 IndAp 175.

21. It has also been urged by the learned Counsel for the respondents that if the Court refuses to give a decision, then the point can be re-agitated: 3 CWN 517 (Privy Council) That was a suit between the parties, whereas in the present case the now contending

parties were co-defendants in the partition suit. But the case is clearly covered by Munni Bibi v. Tirloki Nath, and that is sufficient for the disposal of this issue without any other authority, and I hold there is no bar of res judicata.

22. The result is that the appeal of the defendants, First Appeal No. 307 of 1928, will be dismissed with costs.

23. Defendant No. 18 does not press for his costs in either Court as he has come to an arrangement with the respondents Nelvigi. C

24. First Appeal No. 479 of 1928, First Appeal No. 479 of 1928 is a cross-appeal to First Appeal No. 307 of 1928 by the auction-purchasers and may be disposed of shortly. At the partition in execution of the decree in suit No. 208 of 1908 certain lands, which the auction-purchasers had purchased in execution of decrees against the first branch, were given to the other branches, and the decree does not give them to the auction-purchasers. It is contended that the auction-purchasers were entitled to enforce their claim against other lands in the hands of branch No. 1 on the basis of the doctrine of substituted security as laid down by the Privy Council in Byjnath Lull v. Ramoodeen Chowdhry 1873 74 L.R. 1 IndAp 106 followed in Mohammad Afzal Khan v. Abddul Rahman (1932) 35 Bom. L.R. 1 which is also a Privy Council case, which lays down that where one of several co-sharers mortgages his undivided share in some of the properties held jointly by them, and thereafter on a partition the mortgaged properties are allotted to the other co-sharers, the mortgagee''s sole right is to proceed against the properties allotted to the mortgagor in lieu of his undivided share. There is also a ruling of the Lahore High Court in Amar Singh v. Bhagwan Das AIR [1933] Lah. 771 to the same effect. These, however, are all cases of mortgagor and mortgagee, and the doctrine of substituted security on which they proceed cannot be extended to cover the case of an auction-purchaser. There is direct authority for this in Sabapathi Pillay v. Thandavaroya Odayar ILR (1919) Mad. 309 in which a purchaser bought in Court auction specific items of properties said to belong to a member of a joint Hindu family. Subsequently, there was a partition decree and only some of these items fell to the share of the judgment-debtor. It was held that the purchaser was entitled to only such of the items as were common to the sale-certificate and the share of the judgment-debtor under the decree, and that he could not compel the judgment-debtor to give him other properties in substitution for the remaining properties comprised in the sale-certificate. Although there has been considerable argument on this point, I do not see any reason to differ from the view of the Madras High Court, and for the reasons which are given in that judgment, with which, with respect, I agree, I am of opinion that there is no justification for extending the theory of substitution, which has been enunciated in respect to persons standing in the relation of promisor and promisee, to persons who are strangers to each other, and therefore the plaintiffs are not entitled to any property other than that which they purchased at the Court sale. This appeal, therefore, fails, and will be dismissed with costs. No claim is made against respondents Nos. 7, 8 and 14, representatives of the other branches, and they will also be entitled to their costs. The decree of the lower Court in suit No. 437 of 1923

will, therefore, be confirmed and both the appeal and the cross-appeal dismissed with costs.

25. In the decree it should be mentioned that the land of which the plaintiffs are entitled to recover possession does not include the one-fourth share claimed by defendant No. 16 Pandurang Vithal Kanitkar in the properties in second appeal No. 829 of 1927.

N.J. Wadia, J.

26. These are cross-appeals against the decree of the Joint First Class Subordinate Judge of Dharwar in civil suit No. 437 of 1923 of that Court. The plaintiffs sued for possession by partition of a half share in the lands mentioned in Schedule A to the plaint and a one-fourth share in the lands mentioned in Schedule B to the plaint, which they alleged their ancestors had purchased at Court sales in the years 1877 and 1878 in execution of certain decrees which had been passed against Hanmant-gauda Lingangauda Bahadur Desai and Basangauda Chikkangauda Bahadur Desai of Agadi.

27. The village of Agadi was granted in inam by the Peshva to one Lingangauda bin Hanmantgauda in the year 1791-1792. The order of the Inam Commissioner, dated January 31, 1859, Exh. 141, shows that the village was continued hereditarily to the lineal male descendants of Lingangauda bin Hanmantgauda as a personal inam. Hanmantgauda was the eldest of the four sons of Lingangauda. Chikkangauda the father of Basangauda was the second son. There were two other sons.

28. The first three defendants in the suit, Chidambargauda bin Ramchandra-gauda, Basangauda bin Ramchandragauda, and Lingangauda bin Ram-chandragauda, are the descendants of Hanmantgauda. The fourth defendant Bapu Dixit bin Parameshwar Dixit is the husband of Tippabai, the grand-daughter of Basangauda bin Chikkangauda. Prior to the Court sales of 1877-78, on October 25, 1870, Hanmantgauda and Basangauda had mortgaged their half share in all the lands of Agadi village for a term of forty-one years beginning from 1871-72 to Vasudevrao Anna and Purushottam Tatya Subedar, the ancestors of defendants Nos. 13 to 15 in the suit. The mortgage was for a sum of Rs. 60,000 and the mortgage deed stipulated that the mortgagees were to be put in possession of the entire village for a term of forty-one years from 1871-72. It was a condition of the mortgage deed that the lands were not to be redeemed by the mortgagors or their descendants till the expiry of the period of forty-one years. The income of the eight-anna share of the mortgagors in the village was calculated at Rs. 1,915 odd and the mortgagees were to take Rs. 1,501 per year out of this in satisfaction of their debt, and a further sum of Rs. 100 for the expenses of a clerk. If in any year the mortgagees were unable, owing to failure of crops, or any similar reason, to recover the full amount of Rs, 1,501, they were to remain in possession for a period beyond the stipulated forty-one years, till the deficit instalments had been paid off. The mortgage deed also stipulated that, if the mortgagors or their heirs caused any hindrance to the mortgagees in the enjoyment of the properties mortgaged, the mortgagees were entitled

to treat the instalments as cancelled, and to recover the amount due on the mortgage deed by getting the shares of the mortgagors sold through the Court. The mortgagees were not allowed to remain in undisturbed possession of the lands mortgaged to them, and in 1892 they brought suit No. 19 of 1892 to realise the moneys due on the mortgage by sale of the mortgaged properties. The auction-purchasers, the ancestors of the present plaintiffs, were not parties to this suit The Subordinate Judge decided the suit in favour of the mortgagees and ordered the mortgagors to pay a sum of Rs. 36,143, which had been found due on the mortgage, within six months. On failure to pay this amount it was ordered that the mortgagees should recover it by sale of the mortgaged property. There was an appeal to the High Court from this decree in which it was decided, in modification of the lower Court''s decree, that, in accordance with the alternative relief which had been asked for by the plaintiffs, the mortgagors should place the mortgagees in possession and management of lands yielding Rs. 1,600 per year and should not interfere with their possession. In accordance with this decision the mortgagees were put in possession of lands sufficient to yield an income of Rs. 1,600 a year in 1896. The other mortgaged lands remained with the mortgagors. In the year 1908 the members of the third branch of the family, the descendants of Bistangauda bin Lingangauda, brought suit No. 208 of 1908 for a partition of the family property. All the members of the family were joined as defendants. Defendants Nos. 1 to 3 in that suit were the descendants of Hanmantgauda bin Lingangauda and defendant No. 4, Tippabai, was the descendant of Basangauda bin Chikkangattda. The descendants of the mortgagees of the mortgage of 1870 were also parties to the suit, being defendants Nos. 6 to 8 in that suit. The auction-purchasers, the ancestors of the present plaintiffs, were also defendants in the suit, being defendants Nos. 9 and 10. Defendant No. 1 in that suit, who was the descendant of the original mortgagor Hanmantgauda, had contended in his written statement that he and the members of his branch were in possession of the lands, that no auction sales had ever taken place, and that the auction-purchasers had been wrongly impleaded in the suit. The auction-purchasers put forward their claim as auction-purchasers of the shares of the descendants of Hanmantgauda bin Lingangauda and Basangauda bin Chikkangauda, and claimed that they were the owners of the shares assigned to those branches, and were entitled to get whatever might be ascertained and assigned to defendants Nos. 1 to 4 in the partition. The suit was decided in 1918.

29. In the suit, from which the present appeals arise, it was contended inter alia that the claim was time-barred, and that it was also barred as res judicata on account of the decision in suit No. 208 of 1908. The learned Subordinate Judge decreed the suit in favour of the plaintiffs and held that they were entitled to recover their shares in the lands held by defendants Nos. 1 to 3, and directed a partition to be made. It was found that some of the lands which had been purchased by the ancestors of the plaintiffs had in the partition of 1908 fallen to the share of defendant No. 5 Mallangauda bin Rangangauda, the descendant of the third branch of Lingangauda''s family. With regard to these lands he disallowed the plaintiffs'' suit holding that they should have put forward their claim before the final decree in the partition suit of 1908 was passed. Against this decision

defendants Nos. 1 to 3 have appealed in appeal No. 307 of 1928. The plaintiffs have appealed in appeal No. 479 of 1928 against the part of the decree which was against them. The two appeals have by consent: of the parties been heard together.

30. The principal contentions raised in the appeal of defendants Nos. 1 to 3 (First Appeal No. 307 of 1928) are, first, that the grant of the village to the family of the defendants conferred only a life estate on the holder for the time being, and that therefore the interest which the ancestors of the plaintiffs purchased in auction in the year 1877-78 came to an end when the judgment-debtors Hanmantgauda bin Lingangauda and Basangauda bin Chikkangauda died; secondly, that the claim of the plaintiffs is barred by res judicata by reason of the decree in suit No. 208 of 1908; and, thirdly, that the plaintiffs" suit is time-barred, since defendants Nos. 1 to 3 have been in adverse possession of the lands in suit since 1896, when the High Court decree in appeal No. 90 of 1895 was passed, or at least from 1909, when the defendants openly asserted, to the knowledge of the plaintiffs, in suit No. 208 of 1908, that they were in possession of the lands.

31. From the order of the Inam Commissioner, Exh. 141, and the entry in the Register of Alienated Villages, it appears that the village was granted to the family of Lingangauda bin Hanmantgauda and his lineal male descendants as personal inam. The estate is not a watan or saran-jam and no authority has been cited in support of the contention that the words "hereditarily to the lineal male heirs of the body of Lingangauda" (putra pautradi vansha parampara) convert the inam into a life estate terminable on the death of each holder. The words only mean that the inam would be continued so long as there was a lineal male heir of the body of Lingangauda in existence. They do not prevent alienation of the estate beyond the life-time of each holder. The view taken by the lower Court that the interests of the judgment-debtors Hanmantgauda and Basangauda, which the plaintiffs purchased, did not come to an end with the deaths of the judgment-debtors appears to me to be correct.

32. The contention that the plaintiffs" claim is res judicata by reason of the decision in suit No. 208 of 1908 is not, in my opinion, sustainable. Suit No. 208 of 1908 was brought by the descendants of Bistangauda, the third son of Lingangauda, against the members of the other three branches for partition of the family property. Defendant No. 1 in that suit was the father of defendants Nos. 1 to 3 in the present suit, defendants Nos. 2 and 3 were their uncles, and defendant No. 4 Tippabai was the wife of Bapu Dixit, defendant No. 4 in the present suit. The mortgagees of the shares of the first two branches were joined as defendants Nos. 6 to 8, and the auction-purchasers, the ancestors of the present plaintiffs, were joined as defendants Nos. 9 and 10. In order to determine whether the decision in that suit operates as res judicata in the present suit it is necessary to examine what the contentions of the parties in that suit were, and what were the findings with regard to them.

33. In the written statement, Exh. 134, put in on November 27, 1909, by Ramchandragauda, defendant No. 1 in that suit and the father of defendants Nos. 1 to 3

in this suit, he denied completely the rights of the auction-purchasers, the ancestors of the present plaintiffs, and contended that they had been wrongly joined as defendants. The auction-purchasers defendants Nos. 9 and 10 in their written statements, Exhts, 135 and 136, claimed that they were the auction-purchasers of the shares of Hanmantgauda and Basangauda and would be entitled to get the lands which would in the partition fall to the shares of the descendants of Hanmantgauda and Basangauda. On these contentions the Subordinate Judge framed the following three issues :ï¿½

(28) Whether defendants Nos. 9, 10 and 33 have purchased the lands stated in their written statements respectively at sales in execution of decrees against the ancestors of defendants Nos. 1 to 4?

(29) Whether the claim of any of these defendants in regard to the said lands is time-barred?

(30) What relief, if any, should be granted to these defendants in the general partition?

34. After these issues had been framed, defendant No. 1 Ramchandragauda put in an application, Exh. 142, on March 27, 1911, contending that issues Nos. 28, 29 and 30 were unnecessary and should not be retained on the ground that the rights of the auction-purchasers, if any, were time-barred, that they were not entitled to any relief against defendant No. 1 in that suit, that the three issues suggested by the auction-purchasers could not, under the law, be raised in that suit, and that as the auction-purchasers claimed through defendants Nos. 1 to 4 the question of the mutual rights as between them could not be tried in that suit. On this application the Court passed an order that the three issues were necessary and should be retained. On December 9, 1915, defendants Nos. 1 to 4 and the plaintiffs gave a purshis, Exh. 422, in which they stated, inter alia, that the mortgagees (defendants Nos. 6, 7 and 8) should recover the amount of their mortgage out of the property allotted to the share of defendants Nos. 1 to 4, and that " the contentions in issue No. 28 are between defendants Nos. 1 to 4 (on the one hand) and defendants Nos. 9 to 11, 14 and 33 (on the other), and plaintiffs have consented to keep a half share by metes in every one of the numbers of lands referred to in that issue with defendants Nos. 1 to 4, and these lands are in the possession of defendants Nos. 1 to 4 now. Excluding the half share of defendants Nos. 1 to 4 in the aforesaid lands, in the remaining half plaintiffs should take a one-fourth share and defendant No. 5 a one-fourth share by metes and bounds. So the issues Nos. 28, 29 and 30 should be decided in this way." It is clear from this purshis and from the application, Exh. 142, that defendant No. 1 in that suit contended that the auction-purchasers were not necessary parties to the suit, that the issues raised by them did not affect the claim of the plaintiffs in suit No. 208, that it was not necessary to decide them in that suit, and that the claim, if any, of the auction-purchasers had been safe-guarded by assigning to defendants Nos. 1 to 4 the lands to which the auction-purchasers laid claim. The suit was decided on September 28, 1917. The Judge found on issue No. 28 that the auction-purchasers had purchased the lands claimed by

them. As regards issues Nos. 29 and 30 he found that they did not arise in that suit. His reasons for coming to this conclusion were that the auction-purchasers had admitted that the lands which they had purchased were in the enjoyment of the mortgagees, that they had not claimed partition and possession of their shares, and that issues Nos. 29 and 30 were premature as far as that suit was concerned and referred to a dispute between defendants Nos. 1 to 5 and the auction-purchasers with which the plaintiffs in that suit had nothing to do. It cannot be said that the question in issue in the present suit, viz., the rights of the auction-purchasers against the judgment-debtors, was one directly and substantially in issue in suit No. 208 of 1908. In (1931) ILR 53 103 (Privy Council) their Lordships of the Privy Council dealt with the question of res judicata as between co-defendants and stated that the principle of res judicata as between co-defendants had been recognised by the English Courts and by a long course of Indian decisions. They referred to the conditions under which this branch of the doctrine of res judicata should be applied as laid down in Cottingham v. Earl of Shrewsbury (1843) 3 Hare 627 and after pointing out that the statement of the law in that case had been followed in many Indian cases they said (p. 165) :

It is, in their Lordships'' opinion, in accord with the provisions of Section 11 of the Code of Civil Procedure, and they adopt it as the correct criterion in cases where it is sought to apply the rule of res judicata as between co-defendants. In such a case, therefore, three conditions are requisite : (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided.

35. The first condition existed in the present case, but the second and the third were clearly absent. It was not necessary for the purposes of the partition to decide the claims of the auction-purchasers of the shares of some of the coparceners against those coparceners. In the lower Court defendants Nos. 1 to 3 appear to have relied on Explanation IV to Section 11 of the CPC in support of their contention that the decision in suit No. 208 of 1908 operated as res judicata in the present suit. The learned Subordinate Judge has rightly pointed out that Explanation IV to Section 11 does not help the defendants since they could not have defeated or thwarted the claim of the plaintiffs in suit No. 208 by claiming partition and separate possession, of their share out of the remaining three-fourths. In the course of this appeal Mr. Coyajee has not relied on Explanation IV to Section 11 and has argued on the authority of Munni Bibi''s case that Section 11 of the CPC is not exhaustive on the subject of res judicata. But, as I have pointed out above, applying the principles laid down in Munni Bibi case, it is clear that the present claim of the plaintiffs is not barred as res judicata. It was not necessary in the partition suit to decide the claims of the auction-purchasers against defendants Nos. 1 to 4 in that suit. In fact defendants Nos. 1 to 4 themselves contended strenuously that it was not necessary. The Court accepted their contention and held that it was not necessary to decide those claims. The third condition laid down by their Lordships of the Privy Council

was also not satisfied. The question between defendants Nos. 1 to 3 and the auction-purchasers was not finally decided. In suit No. 208 of 1908 the auction-purchasers put forward their claims and asked for decision of the issues framed as a result of their claims. The Court, largely owing to the contentions of the father of defendants Nos. 1 to 3, left the issues undecided, holding them to be premature, and impliedly leaving it open to the auction-purchasers to bring a fresh suit for the relief claimed by them. It has been held by the Privy Council in Parsotam Gir v. Narbada Gir ILR (1899) IndAp 175 : 1 Bom. L.R. 700 that such circumstances could not constitute res judicata either under the general law or under the Civil Procedure Code, there being no final decision of the questions in issue.

36. It has been argued on behalf of defendants Nos. 1 to 3 that it was the duty of the plaintiffs auction-purchasers to have asked for partition and separate possession of their shares in the general partition suit of 1908 to which they were parties, and that they not having done so, the matter is now res judicata. We have been referred to the decisions in Sadu bin Raghu v. Ram bin Govind ILR (1892) Bom. 608 Lakshman v. Gopal ILR (1898) Bom. 385 and Ashidbai v. Abdulla ILR (1906) Bom. L.R. 652 in support of this contention. These cases do not, however, help the defendants. All that they decided was that purchasers or mortgagees of a coparcener''s share in the joint property were proper and even necessary parties to a suit for partition. But in none of these cases was it held that the purchaser or mortgagee of a coparcener''s share is bound to ask for partition and separate possession of his share, and that if he fails to do so the remedy is barred to him afterwards. The reason for the decisions in the cases referred to is given by Chandavarkar J. in Ashidbai v. Abdulla (p. 291):

When a suit for partition is brought by a person alleging that it is undivided property and that he has a certain share in it, the law requires that, in order to enable the Court to ascertain such person''s share, it must have before it as parties to the suit all the persons admittedly having or claiming to have shares in the property. Otherwise there cannot be a valid, final and binding decree for partition. The Quantum of the share of the plaintiff must be determined with reference to the number of sharers and their respective shares. And such determination of the shares, being essential for the determination of the plaintiff''s share, enables the Court to pass a complete decree for partition, allotting to each party, whether he is plaintiff or defendant, his share. In such a case it is obvious injustice that a defendant should be driven to another suit to have his share already determined partitioned off. That is the reason of the rule.

37. The auction-purchasers were not, in my opinion, bound to ask for partition and separate possession of their shares in the suit of 1908, though they were necessary parties, in order to enable the Court to determine the quantum of each share. Their not asking for possession in 1908 did not affect the quantum of the share of the plaintiffs or other defendants in that suit, since the share which they claimed was only the share which would be allotted to the branches of Hanraantgauda and Basangauda, who were already represented in the suit. It has been argued that it was the duty of the

auction-purchasers to claim partition and separate possession in the suit of 1908 in order to enable the Court to work out the equities between the parties. This, however, was actually done by the Court when it directed that the plaintiffs and defendant No. 5 in that suit should get their shares in the properties free from the claims of the auction-purchasers, and when, by an arrangement between plaintiffs and defendants Nos. 1 to 4, a half share In every one of the lands with which the auction-purchasers were concerned was kept with defendants Nos. 1 to 4.

38. In discussing this question I have assumed that the auction-purchasers had not asked for partition and separate possession in suit No. 208 of 1908. In the judgment in that suit the learned Judge says, when dealing with issues Nos. 29 and 30, that the auction-purchasers had not claimed partition and possession of their shares. Reading paragraph 10 of the written statement of defendant No. 9 in that suit, Exh. 135, it appears to me, however, that he did ask for possession. After referring to the rights of the mortgagees who, according to him, were in possession at the time, he said:

Hence on the termination of his mortgage right the members of the family of defendants Nos. 9 and 10 are (entitled) to get the possession of that property in accordance with the (auction sale) certificates. Therefore the plaintiffs and defendants Nos. 1 to 5 have no right of ownership at all over the property mentioned in paragraphs 2, 3, 4, 5, 6, 7 and 8. As defendants Nos. 9 ''and 10 and members of their family have acquired the rights which the deceased Hanmantgauda and the deceased Basangauda and Chidambergauda had in the lands mentioned above the members of the family of defendants Nos. 9 and 10 (shall) become the owners of the lands (which will be) assigned to the joint share of the deceased Hanmantgauda and Chidambergauda and Basangauda at any partition (that may take place) between the parties under any circumstances. Hence the members of the family of these defendants Nos. 9 and 10 are entitled to get (whatever) lands that would be ascertained (and assigned) to the shares of the said persons.

39. This appears to me to be a prayer for possession, and defendants Nos. 1 to 3 evidently treated it as such. In paragraph 5 of their written statement in this suit, Exh. 68, they say after referring to suit No. 208 of 1908:

The present plaintiffs were defendants therein; and the present plaintiffs having made a prayer in that suit to have their respective shares separated and possession thereof awarded to them aft issue even was framed in that respect, and as they (afterwards) gave up that prayer the present suit is barred by res judicata.

40. The same statement has been made by defendants Nos. 6, 7, 8, 9, 10, 11, and 12 (plaintiffs in suit No. 208 of 1908) in paragraph 6 of their written statement, Exh. 74, in this suit. They say:

But even the present plaintiffs were parties to the aforesaid partition suit (No. 208 of 1908) and having prayed that they should be awarded possession after having their share

separated in lands purchased by them, they even produced sale certificates obtained by them from the Court. And an issue had been framed in respect of the same. But afterwards they gave up their demand.

41. The position, therefore, is that in suit No. 208 the auction-purchasers do appear, though not in very clear terms, to have asked for partition and possession. They were not legally bound to do so. Whether they did or did not ask for possession, the Court refused, on the request of the father of defendants Nos. 1 to 3, to decide the issues as to their rights against defendants Nos. 1 to 3. There cannot, therefore, be a bar of res judicata.

42. There is another ground also on which this contention of the defendants must fail. In suit No. 208 of 1908 defendants Nos. 1 to 3 contended, that the auction-purchasers had been wrongly joined as defendants, and that, as they claimed through defendants Nos. 1 to 4 in that suit, the question of the mutual rights between them could not be tried in that suit, and that the three issues raised on the pleadings of the auction-purchasers should not be retained. In the purshis, Exh. 422, put in by them, they informed the Court that by an agreement between them and the plaintiffs it had been arranged that a half share in every one of the lands, in which the auction-purchasers were concerned, would be retained with defendants Nos. 1 to 4, and that issues Nos. 28, 29 and 30 should be decided accordingly. As a result of these contentions the Judge held that issues Nos. 29 and 30 were premature, and that the dispute between the auction-purchasers and defendants Nos. 1 to 4 was not one which it was necessary to decide for the purposes of that suit. It is clear that this finding of the Judge was largely, if not entirely, due to the contention of defendants Nos. 1 to 3''s father. The contentions of defendants Nos. 1 to 3 in the present suit are absolutely opposed to their contentions in the former suit. Here they contend that the auction-purchasers were necessary parties to suit No. 208 of 1908, that it was obligatory on them to ask for partition and separate possession in that suit, that the dispute between the auction-purchasers and defendants Nos. 1 to 3 should have been decided in that suit, and that as the auction-purchasers did not obtain a decision on their claim in that suit, their remedy is now barred on the ground of res judicata. The conduct of the defendants clearly amounts to approbating and reprobating. By contending in suit No. 208 of 1908 that the dispute between them and the auction-purchasers could not be decided in that suit they obtained from the Court a decision in their favour to the effect that the claim of the auction-purchasers could not be decided in that suit. They are now trying to defeat the claims of the auction-purchasers by contending that the auction-purchasers could and should have obtained a decision on their claims in the earlier suit. This they cannot be allowed to do. On this ground also their contention as regards res judicata must fail.

43. It has been argued on behalf of defendants Nos. 1 to 3 that the possession of these defendants had been adverse to the plaintiffs from 1896, when, under the decree of the High Court in appeal No. 90 of 1895, the mortgagees were put in possession of certain of the mortgaged lands, sufficient to give them an income of Rs. 1,600 a year, and the rest of the mortgaged lands remained with the mortgagors, the ancestors of defendants Nos.

1 to 3. There is, however, nothing to show that the auction-purchasers were aware of this arrangement made in 1896. They were, not parties to suit No. 19 of 1892, and it is clear from their contention in suit No. 208 of 1908 that till the date on which they put in their written statement in that suit, i. e., November 27, 1909, they were under the impression that the mortgage of 1870 was still subsisting and that the mortgagees were in possession of the lands. The mere fact that in suit No. 19 of 1892 an attempt was made by the defendants to serve a summons on Kalyanappa, one of the auction-purchasers, would not justify the inference that Kalyanappa was aware of that suit or of the allegations made in it by the parties. The summons was not actually served on him. The fact that Kalyanappa attested some leases relating to some of the lands in suit in 1897 would also not fix him with knowledge of the contents of the leases. There is, therefore, no evidence which would justify us in holding that the auction-purchasers were aware that some of the mortgaged lands were in the possession of the mortgagors from 1896 onwards. It would only be from November, 1909, when the defendants put in their written statements in suit No. 208 of 1908, that the auction-purchasers could be said to have known that the defendants were claiming possession adversely to them. In that suit the father of defendants Nos. 1 to 3 had alleged that he was in possession adversely to the auction-purchasers and a specific issue had been framed on that point, issue No. 29 : "Whether the claim of any of these defendants (auction-purchasers) in regard to the suit lands is time-barred." Suit No. 208 of 1908 was not decided till September 28, 1917. The question at issue between the parties in that suit was the one now in issue between them, viz., whether the claim of the auction-purchasers against the judgment-debtors was time-barred. Till that suit was decided in 1917 the auction-purchasers could not have brought a suit against defendants Nos. 1 to 3 for possession. The auction-purchasers are, therefore, entitled to claim the benefit of Section 14 of the Indian Limitation Act and to say that in computing the period of limitation against them the period from November, 1909, when defendants Nos. 1 to 3 openly put forward their claim to adverse possession, till September, 1917, when the case was decided, should be excluded. If this period is excluded the plaintiffs" suit is within time under Article 137 of the Indian Limitation Act.

44. It has been contended for the auction-purchasers that the possession of defendants Nos. 1 to 3 did not become adverse to them till 1919 when the claim of the mortgagees was finally satisfied as stated in the purshis given by defendants Nos. 2 and 3, Exh. 415. According to this contention the mortgage of 1870 did not become merged in the decree of the High Court in appeal No. 90 of 1895 passed in the year 1896. That decree, it is contended, only restored the parties to their former position under the mortgage bond. Although by the decree of the High Court the mortgagees were put in possession of some of the mortgaged lands and the other lands remained in the possession of the mortgagors from 1896 onwards, these lands continued to remain security for the mortgage, and the auction purchasers were not entitled to obtain possession of them till the claims of the mortgagees were fully satisfied in 1919. The decree of the High Court was neither a preliminary decree on a mortgage nor a final decree. In suit No. 19 of 1892 the mortgagees had prayed that the eight anna share of the mortgagors in the village of

Agadi should be put to sale and the mortgagees should be awarded the amount of Rs. 41,156 odd claimed by them. In the alternative they had prayed that they might be allowed to have separate possession of the eight anna share of the mortgagors by partition till the debt was satisfied. The lower Court granted the first prayer of the mortgagees and ordered the mortgagors to pay the sum of Rs. 36,143, and directed that in default the mortgagees should recover the amount with costs by sale of the mortgaged property. The High Court, in appeal, thought that it would be in the interest of all the parties that there should be no sale and no enforced partition. They, therefore, provided for an alternative relief by directing the defendants-mortgagors to place the mortgagees in possession and management of lands yielding Rs. 1,600 per year as rent. The order further directed that if the mortgagors failed to do these acts within three months from the date of the decree, the plaintiffs could proceed to the sale of the property. The decree did not say what was to happen if, after the mortgagees had been put in possession of lands yielding Rs. 1,600 per year, their possession was interfered with by the mortgagors, or if for any reason the income of the lands handed over to them fell below Rs. 1,600. It has been argued by Mr. Coyajee for defendants Nos. 1 to 3 that the mortgage became merged in the decree of the High Court and that after the decree the only remedy of the mortgagees, if their possession was interfered with, would have been for contempt. On this view of the case we would have to assume that the decree of the High Court intended to weaken the remedy available to the mortgagees and to diminish the security for the mortgage amount. I find it difficult to accept this view. The findings in the suit and in the appeal had all been in favour of the mortgagees, and under such circumstances it could not have been the intention of the High Court to take away from the mortgagees their ultimate remedy of recovering the mortgage amount by sale of the whole of the mortgaged property. I am, therefore, of opinion that the mortgage of 1870 did not become merged in the decree of 1896 and that the rights and security available to the mortgagees under the terms of the mortgage bond remained intact after 1896. This view receives support from the purshis given by the plaintiffs and defendants Nos. 1 to 4 in suit No. 208 of 1908, Exh. 422. In paragraph 8 of that purshis it was stated that "defendants Nos. 6, 7 and 8 (mortgagees) should recover the amount of their mortgage out of the property allotted to the share of defendants Nos. 1 to 4 in this suit". The judgment in the suit also declared that:

The plaintiffs and defendant No. 5 should get their share in the properties of schedules A and C free from the mortgage lien of defendants Nos. 6 to 8 who have to recover their moneys from the properties given to the share of defendants Nos. 1 to 4.

45. It would appear, therefore, that the father of defendants Nos. 1 to 3 and the plaintiffs, who were the descendants of the third branch of the familyï¿½all assumed in 1915 that the right of the mortgagees over the property in the hands of the mortgagors was still subsisting. In the course of the judgment of the High Court in appeal No. 90 of 1895 it was stated:

Of course if no sale takes place and the plaintiffs continue to be in the management under the terms of the bond they will be entitled to recover the karkun''s salary. It would be in the interest of both the parties that there should be no sale and no enforced partition of the plaintiffs'' share.

This paragraph suggests that the High Court contemplated that the mortgage should not become merged in the decree and that the properties would continue to be governed by the terms of the mortgage deed.

46. I am, therefore, of opinion that the mortgage did not become merged in the decree of 1896. The whole of the property mortgaged continued to remain security for the mortgage amount till that amount was finally paid off in 1919, and, as the auction-purchasers were not entitled to recover possession of the property till the claims of the mortgagees were satisfied, the possession of the mortgagors defendants Nos. 1 to 3 did not become adverse to the auction-purchasers till 1919. On this view of the case the plaintiffs'' claim would not be time-barred.

47. In my opinion, therefore, the plaintiffs had a subsisting right which was neither barred as res judicata by reason of the decree in suit No. 208 of 1908, nor time-barred. Appeal No. 307 filed by defendants Nos. 1 to 3 must, therefore, fail.

48. First Appeal No. 479 of 1928. In the cross-appeal No. 479, the appellants, who were the original plaintiffs, have appealed against the decision of the learned Subordinate Judge with regard to those lands which were purchased by the auction-purchasers but which in the suit of 1908 went to the share of persons other than defendants Nos. 1 to 3. The learned Subordinate Judge held that with regard to these lands the plaintiffs should have put forward their claim in the partition suit of 1908 and should have got them allotted to the share of defendants Nos. 1 to 3 before the final decree in the suit was passed; or, if they were dissatisfied with that decree, they should have appealed, and that therefore their remedy was barred as res judicata. The appellants admit that they have no right to the lands which in the partition had gone to the share of persons other than defendants Nos. 1 to 3. They claim, however, that, as some of the lands purchased by them were in the partition allotted to other persons, they are entitled to be compensated from the lands which in the partition have fallen to the share of defendants Nos. 1 to 3 but which were not purchased by the plaintiffs in 1877-78. In support of their claim they have relied on the decisions in Mohammad Afzal Khan v. Abdul Rahman (1932) 35 Bom. L.R. 1 Amar Singh v. Bhagwan Das AIR [1933] Lah. 771 and Byjnath hall v. Ramoodeen Chowdhry 1873 4 L.R. 1 IndAp 106 All these decisions related to the rights of mortgagees in cases in which some of the mortgaged properties had, in partitions subsequent to the mortgage, been allotted to other co-sharers of the mortgagors. In such cases it was held that the mortgagee had the right to proceed against the properties other than the mortgaged property which had fallen in the partition to the share of the mortgagor. In Sabapathi Pillay v. Thanda-varoya Odayar ILR (1919) Mad. 309 which was a case in which the purchaser bought in Court auction specific items of properties belonging to a member of a joint

Hindu family, and subsequently there was a partition decree and only some of these items fell to the share of the judgment-debtor, it was held that the purchaser was entitled to only such of the items as were common to the sale-certificate and the share of the judgment-debtor under the decree, and that he could not compel the judgment-debtor to give him other properties in substitution for the remaining properties comprised in the sale-certificate. The ground on which Seshagiri Ayyar and Moore JJ. based their judgment in that case was that there was no warranty in a Court sale and no privity of contract between an auction-purchaser and a judgment-debtor, and that it is the decree-holder who brings the property to sale. He prepares the proclamation and to the best of his knowledge places before the public all the available information in respect of the property to be sold. Although the judgment-debtor is expected to assist the Court in settling the proclamation, and although his failure to do so may entail some serious consequences, there is no provision of law which brings him into contact with the bidders at a sale. On these grounds they held that there was no justification for extending the theory of substitution, which had been enunciated in respect of persons standing in the relation of promisor and promisee, to persons who are strangers to each other. This view appears to me to be correct. The plaintiffs were not, in my opinion, entitled to claim the properties which had been allotted to defendants Nos. 1 to 3 in the partition suit of 1908, but which had not been purchased by the plaintiffs, in substitution of the properties purchased by them which had in the partition gone to the shares of others. Appeal No. 479 of 1928 must, therefore, fail.

49. The decree of the lower Court in suit No. 437 of 1923 must, therefore, be confirmed and the appeals Nos. 307 and 479 of 1928 dismissed with costs.