

(1923) 02 BOM CK 0044

Bombay High Court

Case No: Second Appeal No. 183 of 1922

Dada Jinappa Vagiani

APPELLANT

Vs

Yesu Sakhoba Ugare

RESPONDENT

Date of Decision: Feb. 6, 1923**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 47

Citation: AIR 1923 Bom 450 : (1923) 25 BOMLR 494 : 73 Ind. Cas. 402**Hon'ble Judges:** Norman Macleod, J; Crump, J**Bench:** Division Bench**Final Decision:** Allowed

Judgement

Norman Macleod, Kt., C.J.

The plaintiff in this case is the brother of one Devendra, who obtained a decree in Suit No. 34 of 1905 against the first defendant. In execution of that decree the suit house was sold and purchased by Devendra. But no possession was obtained. Consequently after Devendra's death the plaintiff had to file this suit. The issues in the trial Court with their answers were :

(1) Does plaintiff prove the auction purchase of June 1, 1807 ? Answer ♦ Yes

(2) Does he prove he succeeds Devendra? Answer ♦ Yes.

(3) Does defendant No 1 show that the transaction was not to be action upon Answer-No.

(4) Is plaintiff's suit barred by time ? Answer-Yes.

2. The result was that the plaintiffs suit was dismissed by the trial Judge on the ground that Section 47, CPC was bar to the suit, and though this suit could have been treated as an execution proceeding, execution was barred before the date of the suit. The learned Judge thought that the decision in Sadashiv bin Makadu. v.

Narayan Vitkal ILR (1911) 35 Bom. 452 : 13 Bom. L.R. 661 was directly in point. There, in execution of a redemption decree, the decree-holder (mortgagee) himself purchased the property at the Court-sale. After the confirmation of the sale the legal representatives of the decree-holder (mortgagee auction purchaser) brought a suit to recover possession of the property so purchased. The defendants (representatives of the mortgagor's judgment-debtors) that the question involved in the suit related to the execution of the decree, therefore, the suit was not maintainable u/s 47, Civil Procedure Code. It was held that that the suit was barred by Section 47, Civil Procedure Code, and that the decree-holder by becoming a purchaser at a Court-sale did not cease to be a party to the suit within the meaning of Section 47, Civil Procedure Code.

3. But although the plaintiffs brother by becoming the auction purchaser in execution of his decree would not thereby cease to be a party to the suit, the question was whether defendants Nos. 2 and 3, sons of the original defendant, were representatives of the first defendant in that suit. Their claim was that their interest in the property was not affected by the plaintiff's brother's purchase and although they were up to a certain time joint with their father, they were not representatives of their father, as they could not be treated as parties to the previous suit. The plaintiff in order to get possession his brother purchased at the auction as, could take proceedings making defendants Nos. 2 and 3 parties to those proceedings, as they were not parties to the suit and they could not be placed on the record as representing any party. Therefore a suit was necessary if the plaintiff to recover the property from defendants Nos. 2 and 3. The question here is whether defendants Nos. 2 and 3 could resist on the contention that all that the vendor purchased was the interest of their father. The learned Judge seemed to consider that they were separated from their father, and that their shares were not affected by the decree. But when the decree was passed they were joint with their father, and in certain circumstances a decree against the head of a joint family governed by Mitakshara law would be binding upon his sons, though they might take proceedings to prove, in the case of an alienation by their father, that the alienation was not justified, or in the case of a suit for a debt, that the debt was not incurred for a proper purpose. However, those questions do not arise here. The decree was passed on a mortgage effected by the father of defendants NOS. 2 and 3 in favour of Devendra. It has never been alleged that that mortgage was not for a proper purpose, or that it was not binding on the family property. No attempt has been made in this suit to suggest that defendant No. 1 had not properly pledged the family property. Therefore it must follow in the ordinary course, when the decree was passed against defendant No. 1, and defendants Nos. 2 and 3 raised no objection, that it was not binding on them, that when the family property was put up for sale in execution on the decree the whole interest passed.

4. That was decided in 21 CWN 442 (Privy Council) . The property of a joint Mitakshara family, consisting of a father and two sons was sold in execution of

decrees against the father, the order and notices providing for the sale of the "right, title and interest" of the judgment-debtor. It appeared from the circumstances in which the above words had been inserted, from the conduct of the sons, and from the price paid by the execution creditor, who became the purchaser, that the intention was to sell the whole property over which the father had a disposing power. In a suit instituted by the sons to set aside the sale as to two-thirds of the property, both Courts in India held that the decrees were for debts binding upon the joint family. It was held by the Privy Council, that the substance, and not the technicalities, of the transaction should be regarded, and that the entire property passed to the purchaser.

5. Therefore we deduce from that decision, that, in the absence of any objection by any member of the family, when joint family property is put up for sale in execution of a decree against a manager, it may be inferred that the intention was to pass the interest of all the members of the family in the property though it may be open to other members of the family to dispute that intention, and to satisfy the Court either that the alienation was not binding on them, or that the debt incurred by their father was not binding on them, or on any other ground that their interests in the family property had not passed to the auction purchaser. In this case no attempt has been made to prove any of the necessary facts which would entitle these defendants to succeed. They really attempted to rely entirely upon technicalities which, as their Lordships point out in the case we have just cited, could not be regarded.

6. The result is that the appeal succeeds and plaintiffs are entitled to possession of the suit property with costs throughout.