BOMBAY HIGH COURT

Mirkha Imamkha

Vs

Bhagirathi Mahadev Abhyankar

(Heaton and H Ward, JJ.)

08.08.1918

JUDGMENT

Heaton, J.

1. The facts which we have had to master in the consideration of these appeals are complicated but for the purpose of Appeal No. 113 of 1917 they may be simply stated: A Mahomedan named Mainaba died possessed of five houses, leaving as his heirs a son, two widows and three daughters. The son Mahomed Hanif died afterwards leaving as his heirs a daughter Aminabi, his widow Roshanbi and a son who was afterwards held to be illegitimate and not to be an heir. A money decree was obtained against the estate of Mahomed Hanif in a suit by a creditor in which the defendants were that deceased person's widow Roshanbi, and his step mother Sakinabi and the son Abdul. His daughter Aminabi, who was really his principal heir, was not made a party to the suit. Thereafter one of the five houses known as No. 371 was sold in execution of the decree and bought by defendant No. 4. What was sold was the right, title and interest of Mahomed Hanif deceased. The plaintiff has become, by processes which it is immaterial at present to set out, the owner of whatever interest Aminabi had in this house. She sued inter alia to recover by partition Aminabi's share and her claim in this particular was rejected. She now appeals to us.

2. She claims that Aminabi's interest in the house was not bound by the decree obtained by the creditor, because Aminabi was not made a defendant in the creditor's suit and that consequently her interest in the house did not pass to the auction purchaser, defendant No. 4. The latter contends, firstly, that Aminabi's share in the house could be sold under the decree, for the decree was against the estate of her deceased father from whom she inherited her interest in the house; and, secondly, in any event, that Aminabi's interest in the house passed at the sale; for what was sold and what was paid for was the father's interest. If the decree was such that Aminabi's interest could be sold under it, then undoubtedly that interest was sold, for it was included in the father's interest the whole of which was sold.

3. If her interest in the house was not bound by the decree, nevertheless as it was in fact sold, it is

contended that it would pass to the purchaser, defendant No. 4. This contention, however, we think, has nothing substantial to support it. There cannot be a valid sale under a decree unless the property sold can properly be sold under the decree.

4. Let us consider the real question: whether the creditor's decree would bind the interest of Aminabi who was not made a defendant. If we consider this question in a purely general way ignoring all questions of Hindu or of Muhammadan Law, the answer must, I think, be that the decree would not bind Aminabi's interest. She was just as much concerned in the matter as the other defendants, in fact more so, for her share in the property was larger. She could not be bound by the decree unless she was in some way properly represented and as a fact she was not represented. She was indeed definitely and explicitly excluded. For the creditor had brought an earlier suit to which Aminabi was a defendant, but the claim as against her was dropped, though against the others and as to them only it was withdrawn with leave to bring another suit.

5. But even if this had not happened, the decree would not be operative against Aminabi's interest. It could not be if she was not represented; and she would not be represented in such a suit to which she was not a party, apart from the peculiarities of Hindu or Muhammadan Law; except on the somewhat curious theory that a creditor's suit, such as this, is in effect an administration suit by a creditor. I do not think it is, although there are Calcutta decisions favouring this view: *Muttyian v. Ahmed Ally*[1] followed in *Amir Dulhin v. Baij Nath Singh*[2] It seems to me to be a mistake in terms to call a suit by a creditor to establish a single debt against the estate of a deceased person a creditor's administration suit. Neither the proceedings nor the decree were appropriate to an administration suit. There was a difference in substance as well as in form. Chandavarkar, J., saw a great difference between such suits as will appear from the observations at the end of his judgment in *Bai Meherbai v. Maganchand*[3]

6. It may at first sight appear that the law is unreasonable, if it will not allow a creditor to establish a debt against the estate of a deceased debtor without making all the heirs defendants, for some or most of the heirs may be in distant countries and it may be impossible to obtain a decree within a reasonable time if all are to be made parties, But this view of the law is, I am glad to think, fallacious. The creditor can compel one of the heirs on the spot to take out Letters of Administration or failing that can take out such Letters himself a proceeding which can be accomplished within a reasonable time although many of the heirs may be living in distant parts of the world. But if a creditor ignores the Probate and Administration Act and elects to bring an ordinary suit, he must be content with the law applicable to ordinary suits. That is both just and reasonable in my opinion.

7. Does the fact that the deceased debtor was a Mahomedan make any difference? There cannot, of course, be any appeal to Hindu Law in this case, for we are concerned only with the ordinary

law or with the Muhammadan Law. The point is fully and dearly dealt with in paragraph 161 of Sir Roland Wilson's Digest of Anglo, Muhammadan Law, 3rd Edition, and in paragraphs 566 and 567 of F.B. Tyabji's Principles of Muhammadan Law.

8. I shall unhesitatingly accept Sir Roland Wilson's conclusions and follow the Allahabad decisions if it be open to us to do so. But is it open to us? Are we not bound by the Bombay decisions referred to in Sir Roland Wilson's discussion of the law?

9. The two Bombay cases referred to by Sir Roland Wilson are *Khurshetbibi v. Keso Vinayek*[4] and *Davalava v. Bhimaji Dhondo*[5] The former judgment in its reasoning deals exclusively with the sale, not with the decree, it does not pronounce whether the decree would bind an heir who was not made a defendant; it finds that the auction-purchaser bought a certain interest in property and was, therefore, entitled to that interest. In the second case the decision was to the same effect: there had been a sale under a decree and the matter decided was rather what the auction-purchaser had bought than what was the effect of the decree. But in any event the later case is no authority; not only because the point decided is the effect of the sale, not of the decree, but also because the reasons given by the two Judges are different. Jardine, J., seems to have had doubts as to applying to Mahomedans a rule evolved from Hindu Law and he contented himself with relying on and following the case of *Khurshetbibi v. Keso Vinayek*[6] We are, therefore, thrown back on that case as the one which stands in the way of giving effect to what we believe to be the law.

10. Broadly speaking, only the parties to a suit are bound by a decree and consequently only their property can be sold under the decree. But to this general rule there is an apparent exception in the case of Hindus. It has become by now well established that the whole of a Hindu family property is in certain circumstances liable to be sold in execution of a decree to which all the sharers are not parties. This is an exception to the general law and appears to be based on some principle of representation which is evolved from a consideration of the law applicable to joint Hindu families. This exception is neither stated nor explained in the case of Khurshetbibi v. Keso Vinayek 12 B. 101 ; 6 Ind. Dec. (N.S.) 553(Supra) it is simply assumed; so we have to look elsewhere for the explanation. We need not go very far. In the case of *Akoba Dada v. Sakharam*[7] Sir Charles Sargent, the same learned Judge who gave judgment in Khurshetbibi's case 12 B. 101 ; 6 Ind. Dec. (N.S. 553(Suupra), said as follows:--"These cases doubtless establish that when the minor son is substantially before the Court, and the proceedings show a clear intention on the part of the Court making the decree to hind the entire estate which is subject to the debt, no mere technical or formal objection will be allowed to prevail against giving full effect to the decree."

11. Again in the case of *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*[8] the Judges of the Privy Council observed:Their Lordships have, therefore, come to the conclusion that although

there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family.

12. Then in the case of Ishan Chunder Mitter v. Buksh Ali Soudagur Marsh. 614 the earliest of all the cases, the liability of a Hindu under a decree to which he was not a party is illustrated by the analogy of a suit against an executor. Underlying all these cases is the idea of substantial representation and the idea arises out of the peculiarities of the Hindu joint family where the property is family property, not individual property; and where the representation is to be of the family, not of individuals. It is clearly essential, therefore, in these cases to ascertain first of all whether the person, whose property is sold under a decree but who was not a party to the decree, was substantially represented in the suit. In this case we know that Aminabi was not substantially represented; she was specifically excluded. That consideration alone would, in this case, demand that the appeal be allowed and that it be held that Aminabi's share in the house could not and did not pass by the sale. But many hours of our time have been spent on the question whether the exception to the general law, which we are considering, applies to Mahomedans as well as to Hindus, Why should it? No reason whatever is given in Khurshetbibi's case 12 B. 101 ; 6 Ind. Dec. (N.S. 553(supra) and none that appeals to us in Mr. Justice Ranade's judgment in Davalava's case 20 B. 338 ; 10 Ind. Dec. (N.S.) 787(Supra). Indeed there is apparently no Bombay case in which the matter is discussed, except in Davalava's case 20 B. 338 ; 10 Ind. Dec. (N.S.) 787 and in that case Jardine, J., does not say a word on the point and Ranade, J., gives reasons which, as I have said, do not appeal to us.

13. The truth seems to be that a rule derived from Hindu Law was applied to Mahomedans without the reasons being stated. Quite recently a Pull Bench of this Court sat to consider a very remarkable instance of this practice of applying Hindu Law to Mahomedans. My learned brother and myself have considered the matter most carefully and have come to the conclusion that it would not be incumbent on us to follow the case of Khurshetbibi v. Keso Vinayek 12 B. 101 ; 6 Ind. Dec. (N.S.) 553(supra) if that case be held to affirm that the theory of substantial representation derived from the Hindu Law applies to Mahomedans. For, to follow that case if it so decides, would be to accept, without any stated reason for doing so, the application to Mahomedans of a rule evolved out of Hindu Law; and to do this would, we think, be to set aside the principle underlying the decision of the Full Bench of this Court in *Isap Ahmad Mograria v. Abhramji Ahmadji Mograria*[9]

14. The plaintiff sued for mesne profits from the date of suit and should have such profits, which must be determined in execution.

15. We have heard the cross-objections of defendant No. 1 and find there is no substance in them. We dismiss them with costs.

16. We allow the Appeal No. 113 of 1917 with costs against defendant No. 4. The decree will have to be modified so as to allow plaintiff to obtain on partition Aminabi's share in house No. 371 and to award plaintiff masne profits from date of suit in respect of that share from defendant No. 4.

17. In Appeal No. 43 of 1917 the defendant No. 2 is the appellant. He has a mortgage from Sakinabi, one of the widows of Mainaba and the step-mother of Mahomed Hanif. This mortgage-deed has not been put in evidence, but it appears that defendant No. 2 is in possession of the ground floor of house No. 529 and he desires that directions should be given that in making the partition the ground floor of house No. 529 should, if possible, be allowed to Sakinabi's share. The desire is natural, but the request is one to be presented and considered when the partition comes to be made. Only the person who makes the partition, knowing the value of the total estate and the value of each house separately and also knowing something of the convenience and wishes of the sharers, can make an equitable and fair partition. The matter is not one for us to pronounce on in appeal, for it has not yet been dealt with by the appropriate authority. But we think defendant No. 2 should not be made liable for plaintiff's costs: that would be most unfair. The decree of the lower Court must be modified by providing that defendant No, 2 is to pay only his own costs. We make no order as to costs in this appeal.

Hayward, J.

18. The plaintiff sued as purchaser to recover possession by partition of Aminabi's share in house No. 371 in Poona City, being part of the estate of Aminabi's deceased father, Mahomed Hanif. The defendant No. 4 resisted the suit as the purchaser of the whole house at a Court-sale of the estate of the deceased Mahomed Hanif.

19. It was not disputed that Aminabi was not personally represented in the litigation leading to the Court sale but it was contended that her share was bound, as it was in the possession of Roshanbi and was sufficiently represented in the litigation by Roshanbi, the widow of the deceased Mahomed Hanif. This contention was upheld on the strength of the decision in the case of Davalava v. Bhimaji 20 B. 338 ; 10 Ind. Deo (N.S.) 787(Supra) by the trial Court. The substantial questions for determination on this first appeal are whether that decision ought to be regarded as binding and, if not, whether it was right. It seems to me that it ought not to be regarded as binding, as the two learned Judges did not agree on the ratio decidendi, which is alone binding according to the authorities underlying paragraph 535 of Volume XVIII of Halsbury's Laws of England; and, with all deference, that it was wrong in that it applied without justification a rule founded on the peculiar nature of the joint family of Hindus to the heirs of a deceased Mahomedan.

20. It was held by Sir Barnes Peacook in the case of Ishan Chunder Mitter v. Buksh Ali Soudagur Marsh. 614 that a Court-sale was binding on the minor son of a Hindu, based upon a decree obtained against the widow as representing the estate of the deceased Hindu. This was approved by the Privy Council in the case of Bissessur Lall Sahoo v. Maharajah Luchmessur Singh 6 I.A. 233 at p. 237 ; 5 C.L.R. 477 (P.C.)(supra) and it was said that it was necessary to look to the substance of the proceedings in Court-sales relating to the estates of deceased Hindus. This principle of representation was subsequently applied by their Lordships in the case of *Daulat Ram v. Mehr Chand*[10] to the transactions of the managing members of joint families of Hindus and it has been regarded ever since as a settled rule governing the joint families of Hindus, as would appear from paragraphs 320 and 333 at pages 425 and 443 of the 8th Edition of Mayne's Hindu Law. It was acted upon by Sir Charles Sargent in the case of *Jairam Bajabashet v. Joma Kondia*[11] where the minor sons of a deceased Hindu were not allowed to dispute the sale of the family property under a decree against the elder son for a debt of the deceased Hindu, and it was extended by the same learned Judge in the case of Khurshetbibi v. Keso Vinayek 12 B. 101 ; 6 Ind. Dec. (N.S.) 553 (Supra)to the heir of a deceased Mahomedan. There the daughter was held bound by a sale under a decree against the son of the deceased Mahomedan. This could not be regarded as a binding authority, as no reasons were given for extending the rule of the joint family of Hindus to the heirs of deceased Mahomedans. No reference was made to the rules of Muhammadan Law nor to the provisions of Regulation IV of 1827 requiring Muhammadan Law to be applied to Mahomedans in default of Acts of the Legislature. It was, moreover, not applied by the same learned Judge several years later to the case of *Ambashankar Harprasad v. Sayad Ali Rasul*[12] It was, however, relied on again, without reasons being stated, by Jardine, J., in the case under immediate consideration namely Davalava v. Bhimaji Dhondo 20 B. 338 ; 10 Ind. Deo (N.S.) 787.(Supra) Ranade, J. on the other hand dealt in detail with the matter but his reasons, though entitled to respect, could not be regarded as binding in default of the approval of the second Judge. He discussed at length the rule governing the joint families of Hindus and then proceeded (page 345) to state that there was no foundation for the contention that the rule was based on the peculiar constitution of a Hindu joint family and that the analogy did not hold good in the case of Mahomedans. His authority for this somewhat startling statement was an obiter dictum in the case of Hukeem Bibee v. Khajah Gowhur Ali 5 Wym. 27 cited in Assamathen Nessa Bibee v. Roy Lutchmeeput Singh 4 C. 142 at p. 164 ; 2 C.L.R. 223 (F.B.) ; 1 Shome L.R. 219 ; 2 Ind. Dec. (N.S.) 92 (Supra)and the extension of the rule without express reasons in the case already mentioned of Khurshetbibi v. Keso Vinayek 12 B. 101 ; 6 Ind. Dec. (N.S.) 553(Supra). He stated further that the creditor could seek his relief against one of several heirs in a case where all the effects might be in the hands of that heir, as the succession was of the kind known as universal and any one of the heirs of a deceased person stood as litigant on behalf of all the others. He relied for this statement on the dissentient judgment of Markby, J., in the Full

Bench case of *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh*[13] Shome L.R. 219 ; 2 Ind. Dec. (N.S.) 92.(Supora) Markby, J. there held that the heirs in possession merely represented the estate, which devolved upon them with all its rights and liabilities by universal succession, and that the estate did not vest in all the heirs immediately as owners (pages 157 to 159), relying on the rules of procedure contained in the Hedaya for the disposal of the estate of a deceased Mahomedan. But this view was not adopted by the majority of the Judges of the Full Bench and it was expressly dissented from by Mahmood, J., as being based upon mere rules of procedure superseded by the Civil Procedure Code, in his exhaustive judgment in the later case of *Jafri Begam v. Amir Muhammad Khan*[14] before the Full Bench of the Allahabad High Court; and the results of the investigation of Mahmood, J., were accepted in the case of Amir Dulhin v. Baij Nath Singh 21 C. 311 ; 10 Ind. Dec. (N.S.) 839 by a subsequent Bench of the Calcutta High Court. There would appear, therefore, to have been but slender foundations in the authorities to support the proposition put forward by Ranade, J., in the case under immediate consideration namely Davalava v. Bhimaji Dhondo 20 B. 338 ; 10 Ind. Dec. (N.S.) 787 that the particular rule governing the transactions of managing members of joint families of Hindu's ought to be extended by analogy to the case of Mahomedans. It was again expressly denied that such extension was permissible in the later case of Pathummabi v. Vittil Ammachabi 26 M. 734 at p. 787(Supra)before the Madras High Court; it was said (page 738) on the authority of Davalava v. Bhimaji 20 B. 338 ; 10 Ind. Dec (N.S.) 787(supra)that the creditors could seek relief against the heirs in possession of the whole estate under the Muhammadan Law. But this later dictum also was shown to be untenable in the judgment of Abdur Rahim, J., in the subsequent case of Abdul Majeeth v. Krishnamachariar 40 Ind. Cas. 210 ; 40 M. 243 at pp. 255 257 (F.B.) ; 32 M.L.J. 195 ; (1917) M.W.N. 346 ; 5 L.W. 767 (Supra)before the Full Bench of the Madras High Court. It seems to me, therefore, with all deference, that the proposition propounded by Ranade, J., extending the rule of representation governing the joint families of Hindus to the heirs of deceased Mahomedans ought, upon the authorities, to be rejected, as directly contrary to the spirit of the provisions of Regulation IV of 1827; and that the rules of the Hedaya providing for the representation by the heirs in possession of the estate of a deceased Mahomedan ought to be disregarded, as mere rules of procedure superseded by the Civil Procedure Code, as pointed out by Mahmood, J. in Jafri Begam v. Amir Muhammad Khan 7 A. 822 ; A.W.N. (1885) 248 ; 4 Ind. Dec. (N.S.) 636 (Supra)before the Full Bench of the Allahabad High Court and approved in the case of Amir Dulhin v. Baij Nath Singh 21 C. 311 ; 10 Ind. Dec. (N.S.) 839(Supra) by the Calcutta High Court and in the judgment of Abdur Rahim, J., in the case of Abdul Majeeth v. Krishnamachariar 40 Ind. Cas. 210 ; 40 M. 243 at pp. 255, 257 (F.B.) ; 32 M.L.J. 195 ; (1917) M.W.N. 346 ; 5 L.W. 767(supra) before the Full Bench of the Madras High Court.

21. It remains only to notice an alternative theory adopted in the case of Muttyjan v. Ahmed Ally 5 C. 370 ; 10 C.L.R. 346 ; 4 Ind. Dec. (N.S.) 237(Supra) by the Calcutta High Court, that

creditors' suits against the heirs in possession should be regarded as administration suits binding on all the heirs of a deceased Mahomedan. It was considered and rejected by Mahmood, J. in the case of Jafri Begam v. Amir Muhammad Khan 7 A. 822 ; A.W.N. (1885) 248; 4 Ind. Dec. (N.S.) 636(Supra) before the Allahabad High Court, but was re-asserted in the case of Amir Dulhin v. Baij Nath Singh 21 C. 311 ; 10 Ind. Dec. (N.S.) 839(Supra) by a subsequent Bench of the Calcutta High Court. It seems to me, with all deference, that mere creditors' suits would be altogether different, as pointed out by Mahmood, J. They would be solely on behalf of those particular creditors and not on behalf of all creditors as contemplated by the form of plaint No. 41 in Appendix A, and by the form of preliminary decree requiring public notice to all interested, No. 17 (13) in Appendix D, of Schedule 1, of the Civil Procedure Code. Nor would they result in the satisfaction of all persons interested and the final distribution of the estate as provided in the form of final decree No. 18 in Appendix D 'and in Order XX, Rule 13, of the 1st Schedule of the Civil Procedure Code. It seems to me, moreover, that there would be no necessity for regarding them as anything but what they really would be or for adopting the admittedly inexact analogy of administration suits for there would be nothing to prevent their being brought, if desired, in the proper form and ample remedy for any practical inconvenience has already been provided in Sections 23 and 69 of the Probate and Administration Act, 1881, by the Legislature. The defendant No. 4 ought not, therefore, in my opinion, to be permitted to succeed either on this ground. He would not be entitled to succeed on the special rule as to representation by managers of joint families of Hindus as already shown and, as it seems to me, further indicated by the remarks of their Lordships in the case of *Khiaraimal v. Daim*[15] before the Privy Council. Nor would he be entitled, as already shown, to appeal to any similar rule of representation under the Muhammadan Law in order to escape the general rule there applied (page 312) that the property of parties not properly represented on the record could not validly be sold by the Court. The discussion by their Lordships of the supposed powers of de facto guardians in the most recent case of *Imambandi v. Mutsaddi*[16] supports, it seems to me, the view that no such rule of representation could be pleaded under Muhammadan Law in aid of an invalid sale by the Court. This case would appear not yet to have been reported. It was only decided on the 28th February 1918 by the Privy Council.

22. This appeal ought, therefore, in my opinion, to be allowed. The cross-objections of respondent No. 1 ought to be dismissed with costs. The appeal of respondent No. 2 ought to be dismissed with costs. Possession by partition of the particular house in dispute with mesne profits and costs ought to be allowed against respondent No. 4.

Cases Referred.

15 C. 370 ; 10 C.L.R. 346 ; 4 Ind. Dec. (N.S.) 237
221 C. 311 ; 10 Ind. Dec. (N.S.) 839
329 B. 96 ; 6 Bom. L.R. 853

412 B. 101 ; 6 Ind. Dec. (N.S.) 553
520 B. 338 ; 10 Ind. Dec. (N.S.) 787
612 B. 101 ; 6 Ind. Dec. (N.S.) 553
79 B. 429 at p. 431 ; 10 Ind. Jur. 67 ; 5 Ind. Dec. (N.S.) 284
86 I.A. 233 at p. 237 ; 5 C.L.R. 477 (P.C.)
941 Ind. Cas 761 ; 19 Bom. L.R. 579 ; 41 B. 588 (F.B)
1014 I.A. 187 ; 1 P.R. 1888 (P.C.) ; 15 C. 70 ; 5 Sar. P.C.J. 84 ; 11 Ind. Jur. 435 ; 7 Ind. Dec. (N.S.) 632
1111 B. 361 ; 11 Ind. Jur. 427 ; 6 Ind. Dec. (N.S.) 236
1219 B. 273 ; 10 Ind. Dee. (N.S.) 185
134 C. 142 at p. 164 ; 2 C.L.R. 223 (F.B.) ; 1
147 A. 822 ; A.W.N. (1885) 248; 4 Ind. Dec. (N.S.) 636
1532 C. 296 ; 7 Bom. L.R. 1 ; 1 C.L.J. 584 ; 32 I. A. 23 ; 8 Sar, P.C.J. 734 ; 9 C.W.N. 201 (P.C.) ; 2 A.L.J. 71
1647 Ind. Cas. 513 ; 45 I.A. 73 ; 20 Bom. L.R. 1022 ; 35 M.L.J. 422 ; 16 A.L.J. 800 ; 24 M.L.T. 330 ; 28 C.L.J. 409 ; 23 C.W.N. 50 ; 5 P.L.W. 276 ; 45 C. 878 ; (1918) M.W.N. 91