NANNI BAI AND OTHERS

v.

GITA BAI

1958

April 14.

(B. P. SINHA, JAFER IMAM and SUBBA RAO JJ.)

Agriculturist, Protection of—Jurisdiction of Special Judge—Execution sale, if binds the legal representative not party to it—Limitation—Mitakshara Law of Partition—Document, if and when must be registered—Admissibility—Sangli State Agriculturist Protection Act (I of 1936)—Indian Limitation Act (IX of 1908), Arts. 12, 134 and 148—Indian Registration Act (Act XVI of 1908), ss. 17 and 49.

This was an appeal by the defendants in a suit for possession on redemption of certain mortgages instituted in the Court of the Special Judge exercising jurisdiction under the Sangli State Agriculturists Protection Act (I of 1936). Their case was that the mortgaged properties had been sold at auction and purchased by their father who had sold most of them to other persons more than 12 years before the institution of the suit and as such the suit was barred by limitation. The trial Court dismissed the suit. On appeal the High Court of Sangli permitted the plaintiff to amend the plaint originally filed so as to include the relief for redemption and remanded the suit. The trial court, thereafter, decreed the suit in part, holding that the claim in respect of portions only of the mortgaged properties was barred by limitation. Both the parties appealed to the High Court of Bombay and the appeals were heard together. The High Court dismissed the defendant's appeal and allowed the plaintiff's appeal holding that Art. 148 and not Art. 134 of the Limitation Act applied. In the result, the plaintiff's suit was decreed in its entirety.

Held, that the preliminary objection that the Special Judge had no jurisdiction under the Sangli State Agriculturists Protection Act to entertain the suit must be overruled. The fixing of 1915 as the date-line by the Act had reference to such reliefs as could be had only by way of reopening of closed transactions and could not, therefore, preclude the Special Judge from granting other reliefs in respect of transactions entered into prior to 1915.

Nor could it be contended in bar that the plaintiff was bound in the first instance to set aside an auction sale of the mortgaged properties in execution of a money decree in which she was not substituted in place of her deceased father as his true heir and legal representative nor made a party and no controversy was raised by the parties nor decided by the Court as to who was the true legal representative. The plaintiff was entitled to ignore the sale and the suit was not barred under Art. 12 of the Limitation Act.

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Malkarjun Bin Shidramappa Pasare v. *Narhari Bin Shivappa*, (1900) L.R. 27 I.A. 216, doubted and distinguished.

In order that Art. 134 of the Limitation Act might be attracted to a suit for possession on redemption, it was necessary for the defendant to prove affirmatively that the mortgagee or his successor-in-interest had transferred a larger interest than was justified by the mortgage. Where, as in the present case, this was not done, Art. 134 could not apply and the only other article which could apply was Art. 148 of the Limitation Act.

Under the Mitakshara School of Hindu Law partition may be either (1) a severance of the joint status of the coparcenary by mere defining of shares but without specific allotments or (2) partition by allotment of specific properties by metes and bounds according to shares. The latter, if reduced to writing becomes compulsorily registrable under s. 17(1)(b) of the Indian Registration Act but the former does not.

Consequently, in the present case such unregistered documents as were adduced by the plaintiff for the limited purpose of proving partition in the former sense did not fall within the mischief of s. 49 of the Indian Registration Act and were admissible in evidence.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 177 of 1954.

Appeal from the judgment and decree dated October 9, 1950, of the Bombay High Court in First Appeals Nos. 361 & 363 of 1948 from Original Decree arising out of the judgment and decree dated July 31, 1946, of the Court of Special Tribunal, Mangalvedhe, in Special Suit No. 1322 of 1938.

L. K. Jha, *Rameshwar Nath*, *J. B. Dadachanji* and *S. N. Andley*, for the appellant.

K. R. Bengeri and *K. R. Chaudhari*, for the respondent.

1958. April 14. The following Judgment of the Court was delivered by

Sinha J.

SINHA J.—This is a defendants' appeal by leave granted by the High Court of Judicature at Bombay, from the decision of that Court, dated October 9, 1950, in two cross-appeals from the decision of the Special Judge of the Special Tribunal Court at Mangalvedhe, dated July 31, 1946, in Special Suit No. 1322 of 1938. Of the two cross-appeals, the First Appeal No. 361 of 1948, by the appellants, was dismissed, and the First

Appeal No. 363 of 1948, by the plaintiff, was allowed. The plaintiff-respondent had instituted another suit, being suit No. 1894 of 1937, which was also tried along with Special Suit No. 1322 of 1938. The former suit stands dismissed as a result of the judgment of the High Court, and no appeal has been brought against that judgment to this Court.

The suit out of which this appeal arises (Special Suit No. 1322 of 1938), was instituted under the provisions of the Sangli State Agriculturists Protection Act, granting certain reliefs from indebtedness to agriculturists of that State which was then outside what used to be called " British India ". The suit as originally framed, prayed for accounts in respect of two mortgages, though there were really three mortgages, to be described in detail hereinafter, and for possession of the lands comprised in those mortgages. The first defendant filed his written statement on January 6, 1940, contesting the suit mainly on the ground that the plaintiff had no title to the mortgaged properties in view of the events that had happened; that the mortgaged properties had been sold at auction and purchased by the defendant's father who, thus, became the full owner thereof; and that he had sold most of the properties to other persons who were holding those properties as full owners. Defendant No. 3 who also represents the original mortgagee, filed a separate written statement supporting the first defendant. Of the defendants who are transferees from the original mortgagees or their heirs, only defendant No. 8 filed his written statement on March 26, 1940, substantially supporting the first defendant's written statement and adding that he had purchased the bulk of the mortgaged properties after acquisition of full title by the mortgagees themselves more than 12 years before the institution of the suit, and that, therefore, it was barred by limitation.

The trial court dismissed the suit by its judgment dated November 26, 1941, with costs. On appeal by the defeated plaintiff, the Special Bench of the High Court of Sangli State, by its judgment dated June 13, 1944, remanded the suit for a fresh trial after having permitted the plaintiff to amend the plaint so as to

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include the relief for redemption. It appears that during the pendency of the suit after remand, an application was made in February, 1945, for making substitution in place of defendant No. 2 who had died meanwhile, but the application was refused by the Court on the ground that the suit had abated as against that defendant. After re-framing the issues and re-hearing the case, the trial court, by its judgment and decree dated July 31, 1946, dismissed the suit as against defendants 6 to 9 who were holding portions of the mortgaged properties by sale-deeds of the years 1919 and 1922, for more than 12 years, as barred by limitation under Art. 134 of the Limitation Act. The Court decreed the suit in respect of the mortgaged portion of R. S. No. 1735, having an area of 16 *acres* and 21 *gunthas*, as against defendant No. 3, and R. S. No. 334 against defendant No. 1's heirs. Each party was directed to bear its own costs throughout. From that decision, the defendants preferred a first appeal, being First Appeal No. 361 of 1948, and the plaintiff filed a cross-appeal, being First Appeal No. 363 of 1948, in the High Court of Judicature at Bombay. Both the appeals were heard together along with two other cross-appeals arising out of the other suit mentioned above. The High Court, by its judgment and decree dated October 9, 1950, dismissed the defendants' appeal No. 361 of 1948, and allowed the plaintiff's appeal No. 363 of 1948, with costs, holding that Art. 148 and not Art. 134 of the Limitation Act, applied to the suit, and that, therefore, it was not barred by limitation. In the result, the plaintiff's suit was decreed in its entirety. Hence, this appeal by the defendants.

A number of questions of fact and law have been raised by the learned counsel for the appellants, but before we proceed to deal with them, it is convenient to dispose of the preliminary points in bar of the suit. At the fore-front of his submissions, the learned counsel for the appellants contended that the suit was outside the jurisdiction of the Special Court created under the Sangli State Agriculturists Protection Act I of 1936. With reference to the provisions of that Act, it was contended that the Act authorized the Special Court to

take accounts and to re-open closed transactions only up to the year 1915, and that as the transactions which were the subject-matter of the suit, were of the years 1898, 1900 and 1901, the Special Court was not competent to go into those transactions and grant any relief to the agriculturist-plaintiff. In our opinion, there is no substance in this contention. The Sangli Act referred to above, had chosen the year 1915 as the dateline beyond which the court was not competent to grant any relief to agriculturists, by way of re-opening of closed transactions. But that does not mean that the court itself was incompetent to grant any other relief in respect of transactions of a date prior to 1915. If the legislature had intended to limit the jurisdiction of the Special Court, as contended on behalf of the appellants, nothing would have been easier than to say in express terms that the court's jurisdiction to grant relief was limited to transactions of that year and after, but there are no such words of limitation in any part of the statute. The operative portion of the statute does not contain any such provision. In our opinion, therefore, the Special Court was competent to entertain the suit for redemption, though it would not be competent to re-open those transactions even if any such question of re-opening closed transactions had been raised. But it is manifest that no such question arose out of the pleadings in this case. Hence, those words of limitation are wholly out of the way of the plaintiff. It may be mentioned that no such plea of want of jurisdiction of the trial court, had been raised in the pleadings or in the issues in the courts below. This ground was raised, for the first time, in the statement of case in this Court. The preliminary objection to the jurisdiction of the trial court is, thus, overruled.

It was next contended that the suit was barred by limitation of one year under Art. 12 of the Limitation Act. The point arose in this way. The properties sought to be redeemed were mortgaged, as will presently appear, successively under three bonds of the years 1898, 1900 and 1901, by the plaintiff's father, Gundi (omitting all reference to his brothers).

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It appears that there was a decree for money of the year 1903, in favour of a third party who is not before us. Gundi had been sued as the original defendant, but after his death, his place was taken by his brother Sadashiv as his heir and legal representative. In execution of the decree, the mortgaged properties were auction-purchased by the mortgagee's son, Fulchand, son of the first defendant as it appears from the sale-certificate, Exh. D-56, dated October 31, 1907. On the basis of this auction-purchase, it has been contended on behalf of the mortgagee that unless the sale were set aside, it would bind Gundi and his successor-in-interest, the plaintiff. The High Court has held that Art. 12 is out of the way of the plaintff because neither the plaintiff nor her father was a party to the sale. If Gundi himself were a party to the execution proceedings, the sale as against him, would bind his estate and his successor-in-interest. But it appears that Gundi was substituted by his brother Sadashiv in the execution proceedings. If Sadashiv could not be the representative-in-interest of Gundi, as will presently appear, he could not have represented Gundi's estate, and, therefore, the sale as against him, would be of no effect as against the plaintiff. But it was argued in answer to this contention that the decision of the Privy Council in the case of *Malkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa* (1), is an authority for the proposition that even if the property was sold by substituting a wrong person as the legal representative of the judgment-debtor, the sale would bind the estate of the judgment-debtor as much as if the right legal representative had been brought on the record of the execution proceedings. Assuming that the decision of the Privy Council in Malkarjun's case (supra) is correct, and that it is not subject to the infirmities of an *ex parte* judgment, asimay well be argued, that decision is clearly distinguishable so far as the present case is concerned. In Malkarjun's case, the executing court had been invited to decide the question as to who was the true legal representative of the judgment-debtor, and the court, after

(1) (1900) L.R. 27 I. A. 216.

judicially determining that controversy, had brought on record the person who was adjudged to be the true legal representative. The sale was held to be of the property of the judgment-debtor through his legal representative, after the adjudication by the court. The Privy Council held that though the decision of the court on the question as to who was the true legal representative, was wrong, it was a decision given in that litigation which affected the judgment-debtor and his true legal representative, unless set aside in due course of law. In the present case, there was no such adjudication. From the scanty evidence that we have on this part of the case, it appears that Gundi, the original defendant, had died and had been, without any controversy, substituted by his brother, Sadashiv. The court had not been invited to determine any controversy as between Sadashiv and the true legal representative of Gundi deceased. In execution proceedings, the property was sold as that of Sadashiv—the substituted judgment-debtor. It was a money-sale and passed only the right title and interest of Sadashiv, if it had any effect at all. Malkarjun's case (supra), therefore, is of no assistance to the appellants. The plaintiff, Gundi's daughter, not being affected in any way by the sale aforesaid, it is not necessary for her to sue for setting aside the sale. She was entitled, as she has done, to ignore those execution proceedings, and to proceed on the assumption, justified in law, that the sale had not affected her inheritance. The suit is, therefore, not barred by Art. 12 of the Limitation Act.

It was next contended that even if Art. 12 was not available to the defendants by way of a bar to the suit, the suit was certainly barred under Art. 134 of the Limitation Act. Under Art. 134, the plaintiff has to sue to recover possession of immoveable property mortgaged and, afterwards, transferred by the mortgagee for a valuable consideration, within 12 years from the date the " transfer becomes known to the plaintiff ". On the other hand, it has been contended on behalf of the plaintiff that the usual

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rule of 60 years' limitation under Art. 148 of the Limitation Act, governs the present case. On this part of the case, the defendants suffer from the initial difficulty that the sale-deeds relied upon by them in aid of the plea of limitation under Art. 134, have not been brought on the record of this case, and, therefore, the Court is not in a position to know the exact terms of the sale-deeds. This difficulty, the appellants sought to overcome by inviting our attention to the statements made in paragraph 8 of the plaint. But those are bald statements giving the reasons why the defendants other than the original mortgagee, were being impleaded as defendants. There is no clear averment in that paragraph of the plaint about the extent of the interest sold by those sale-deeds and other transfers referred to therein. The Court is, therefore, not in a position to find out the true position. Those sale-deeds themselves were the primary evidence of the interest sold. If those sale-deeds which are said to be registered documents, were not available for any reasons, certified copies thereof could be adduced as secondary evidence, but no foundation has been laid in the pleadings for the reception of other evidence which must always be of a very weak character in place of registered documents evidencing those transactions. Article 134 of the Limitation Act contemplates a sale by the mortgagee in excess of his interest as such. The legislature, naturally, treats the possession of such transferees as wrongful, and therefore, adverse to the mortgagor if he is aware of the transaction. Hence, the longer period of 60 years for redemption of the mortgaged property in the hands of the mortgagee or his successor-in-interest, is cut down to the shorter period of 12 years' wrongful possession if the transfer by the mortgagee is in respect of a larger interest than that mortgaged to him. In order, therefore, to attract the operation of Art. 134, the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under Art. 134 is not available to the

defendant in a suit for possession after redemption. A good deal of argument was addressed on the question as to upon whom lay the burden to prove the date of the starting point of limitation under that article. It was argued on behalf of the defendants-appellants that as it is a matter within the special knowledge of the plaintiff, the plaint should disclose the date on which the plaintiff became aware of the transfer. On the other hand, it was contended on behalf of the plaintiff-respondent that it is for the defendants to plead and prove the facts including the date of the knowledge which would attract the bar of limitation under Art. 134. As we are not satisfied, for the reasons given above, that Art. 134 is attracted to the present case, it is not necessary to pronounce upon that controversy. It is, thus, clear that if Arts. 12 and 134 of the Limitation Act, do not stand in the way of the plaintiff's right to recover possession, the only other Article which will apply to the suit, is Art. 148. It is common ground that if that Article is applied, the suit is well within time.

Before dealing with the factual aspects of the case, it is necessary to deal with another plea in bar of the suit raised on behalf of the appellants. It is contended that the suit is bad for defect of parties in so far as the heirs of the second defendant are concerned. It appears from the order dated March 27, 1946, passed by the trial court during the pendency of the suit after remand, that the second defendant died on April 26, 1943, that is to say, while the appeal before the Bombay High Court was pending in that Court before remand. The then appellant who was the plaintiff, did not take steps to bring on record the legal representatives of that defendant. An attempt was made by the plaintiff later on to get his heirs substituted on the record, but the Court upheld the defendants' objection and did not allow substitution to be made. It was, therefore, noted that the appeal which was then pending in the High Court, had abated as against defendant No. 2, and that, the order of remand made after his death and in the absence of his legal representatives, would not affect them. Therefore, it was

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contended that the whole suit would abate, because, in the absence of the heirs of the deceased defendant No. 2, the suit was imperfectly constituted under O. 34, r. 1 of the Code of Civil Procedure. That rule requires that "all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties....." The original mortgagee under the three mortgages, was Kasturchand Kaniram. The defendant No. 1 has contested this suit by filing a separate written statement of his own as the successor-in-interest of the original mortgagee. It does not appear from the pleadings that the second defendant was a joint mortgagee with the first defendant or his ancestors. The only statement in the plaint in para. 8, with reference to the second defendant, is that the "Lands R. S. No. 1735 has gone to the share of defendant No. 2. Defendant No. 3 looks after all the transactions of defendant No. 2 and the shop running under the name of 'Kaniram Kasturchand' has gone to the share of defendant No. 3". Thus, it is not a case of the first defendant being joint with the other defendants including defendant No. 2 who is not now represented on the record. If defendant No. 2 had any distinct interest, that, on the plaint, appears to be confined to R. S. No. 1735. In the written statement filed on behalf of the third defendant, it is stated in para. 9 that the mortgaged portion of R. S. No. 1735 which, according to the plaint, was the property of the second defendant, was really in possession of the third defendant as owner. It would, thus, appear that even in respect of that plot, the second defendant had no subsisting interest. This claim of the third defendant is strengthened by the fact that the second defendant did not file any written statement challenging the statement aforesaid of the third defendant or claiming any interest in that plot or any other part of the mortgaged property. The second defendant had remained *ex parte* throughout, apparently because he had no interest in the property to be redeemed. In any view of the matter, his heirs are not parties to this suit, and any determination in this suit will not bind them. But it does appear that

the second defendant had no subsisting interest, if he had any at any anterior period, in any portion of the mortgaged property.

It was also contended that the original defendant No. 8 died, and in his place defendants Nos. 8a to 8g were substituted. It appears that of the seven persons substituted on the record as the legal representatives of the original defendant No. 8, only defendants 8e, 8f and 8g were served, and the others, namely, 8a, 8b, 8c and 8d were not served. On those facts, it was contended that the suit for redemption was bad in the absence of all the necessary parties. It was sought, at one stage of the arguments, to be argued that the suit had abated against defendant No. 8, and this argument, in the High Court, was met by the observation that under O. XXII, r. 4, Code of Civil Procedure, it was enough to bring on record only some out of the several legal representatives of a deceased party, on the authority of the judgment of the Bombay High Court in *Mulchand* v. *Jairamdas* (1). But on the facts stated above, there was no room for the application of r. 4, O. XXII of the Code. All the legal representatives, at any rate, all those persons who were said to be the legal representatives of the deceased defendant No. 8, had been substituted. Thus, the requirements of O. XXII had been fulfilled. If, subsequently, some of the heirs, thus substituted, are not served, the question is not one of abatement of the suit or of the appeal, but as to whether the suit or the appeal was competent in the absence of those persons. It does not appear that the absent parties were really necessary parties to the suit or the appeal in the sense that they were jointly interested with the others already on the record in any portion of the mortgaged property. In what circumstances they were not served or ordered to be struck off from the record, does not clearly appear from the printed record before us. The defendant No. 8e who happens to be the brother of the original defendant No. 8, has only filed a written statement claiming that he and his vendor, defendant No. 7, had been in possession for more than 12 years, and that

(1) (1934) 37 Bom. L. R. 288.

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the suit was, on that count, barred by limitation. None of the other defendants who had been brought on the record in place of the original defendant No. 8, has appeared in the suit or in the appeal to contest the claim of defendant No. 8e that he was in possession of that portion of the property, namely, 6 *acres* and 32 *gunthas* out of R. S. No. 242 (old survey No. 233). Hence, there was no question of abatement of the suit or the appeal. The only question which may or may not be ultimately found to be material on a proper investigation, may be whether the decree to be passed in this case, would be binding on those who had not been served. For ought we know it may be that they were not interested in the plot sought to be redeemed. On these findings, it must be held that the preliminary objections raised on behalf of the defendants in bar of the suit, must be overruled. Hence, the whole suit cannot be held to be incompetent for the reason that the heirs of defendant No. 2 have not been brought on the record.

Having, thus, disposed of the specific pleas in bar of the suit, we now turn to the contentions bearing on the factual aspects of the controversy. It was contended that the plaintiff who is admittedly the daughter of Gundi, has not established her title to the mortgaged properties. In this connection, it is convenient to set out the essential facts in relation to the three mortgage-deeds in question. The first mortgage is dated June 4, 1898, in favour of Kasturchand Kaniram, executed by Gundi, son of Appa, for the sum of Rs. 700, the amount borrowed by him, mortgaging 7 survey numbers with an aggregate area of 43 *acres* and 38 *gunthas*. It was a mortgage with possession for a period of 4 years, with Gundi's two brothers—Sadashiv and Rama—as sureties for the re-payment of the amount borrowed which was the personal responsibility of Gundi under the terms of the document. But the property mortgaged is admittedly the ancestral land of the three brothers. The second mortgage between the same parties in respect of the same properties, bears the date May 25, 1900. It secures a further advance of Rs. 300 to the mortgagor, the payment of which debt

is again assured by his two brothers—Sadashiv and Rama—as sureties. The third mortgage-bond is for a further advance of Rs. 200 to the mortgagor Gundi, with his brothers aforesaid again figuring as sureties. It would, thus, appear that all the three mortgages are between the same parties as mortgagor and mortgagee, and the two brothers of the mortgagor join in executing the mortgages as sureties, the property given in mortgage belonging to all the three brothers. The total advance of Rs. 1,200 under those three mortgages, was made to the principal debtor, Gundi. It appears that, of the three brothers, Rama died first, and then Gundi, some time in 1903, survived by his two daughters—the plaintiff and defendant No. 13. The plaintiff's case is that the common ancestor, Appa, in his life-time, had effected a partition amongst his three sons aforesaid, giving them each specific portions of his lands, reserving a portion for the maintenance of his wife. Those transactions are exhibits P-43, P-44, P-45 and P-46, all dated August 31 or September 1, 1892, and, apparently, forming parts of the same transaction. These are formal documents giving details of the lands allotted to each one of the three brothers and to their mother by way of maintenance. The common recital in these documents, is that the executant of the documents, Appa, had three sons—Gundi, Sadashiv and Rama, in order of seniority—" who cannot pull on together ". The document further recites: " Hence, separation having been effected with your consent, (I have) divided in every way and given you the estate, the land, the assets etc., pertaining to the one-third share. The same are as under. " Then follow the details of the properties separately allotted to each of them. The plaintiff's case is that ever since 1892—the date of the documents aforesaid—the three branches of the family had become separate in estate, if not also divided in all respects, and that on the death of Rama, Gundi and his brother Sadashiv inherited his one-third share in equal moieties, that is to say, on the death of their mother and their brother, the two brothers became owners of half and half of the ancestral

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property left by Appa who appears to have died soon after the alleged partition. The plaintiff's case further is that the principal mortgagor in all those three transactions aforesaid, was Gundi, and his two brothers had joined only as sureties by way of additional security in favour of the mortgagee. It has been contended on the other hand on behalf of the defendants-appellants that, in the first instance, the documents of 1892, referred to above, do not evidence an actual partition by metes and bounds, but only represent an arrangement by way of convenience for more efficient and peaceful management of the family property, and that, alternatively, if those documents are claimed to have the efficacy of partition deeds, they are inadmissible in evidence for want of registration. The courts below have held that those documents are inadmissible in evidence as regular deeds of partition which they purport to be, in view of the provisions of the Registration Act. But those transactions have been used for the collateral purpose of showing that from that time, the three brothers became separate in estate, and evidencing the clear intention on the part of each one of them to live as separated members, each with one-third share in the paternal estate. In this connection, reliance was placed on behalf of the appellants, upon what was alleged to be the subsequent conduct of the three brothers after 1892, as evidenced by the three mortgage-bonds themselves and the sale-deed—exhibit D-54—dated June 17, 1909. By the last named document, Sadashiv purported to sell to Fulchand Kasturchand, son of the original mortgagee, practically the whole of the mortgaged properties, for a sum of Rs. 1,500. The recitals in the sale-deed would certainly make it out that the three brothers were joint in estate, and that the sale-deed was being executed to pay off the personal loans of Gundi and Rama during the years 1900 to 1903, plus the loans taken by the vendor himself. Finally, the deed proceeds to make the following very significant declaration as to the status of the members of the so-called joint family :—

"As I have sold to you my right, title and interest in the above said lands, neither I nor my heirs and

executors of my will have any right whatsoever over the said property. As I am the male heir in the joint family by survivorship, nobody except me has any interest in the aforesaid lands. I have sold to you whatever interest I had in the said lands."

It was further contended that even strangers to the family treated the brothers as joint in estate as shown by the execution proceedings and the sale certificates of the years 1903 to 1907, whereby Sadashiv was substituted as the sole heir and legal representative of the defendant Gundi, in the suit for money which resulted in the auction-sale referred to above, of the year 1907.

If the transaction of the year 1892, is admissible in evidence for the purpose for which the document was used in the courts below, namely, to prove separation in estate, there is no room for ambiguity, and the position is clear that the three brothers had become separate. Further recitals in those documents that specific portions of the ancestral property had been allotted to the three brothers separately, being in the nature of a partition deed by the father in his life-time, and being unregistered, are inadmissible in evidence to prove such a partition. But the plaintiff's case does not depend upon proof of actual partition by metes and bounds. In the absence of any ambiguity, the later transactions would not be relevant except to show that there was a subsequent re-union amongst the brothers, which is no party's case.

But it was argued on behalf of the appellants that those documents—exhibits P series aforesaid—are not admissible in evidence even for the limited purpose of showing separation in estate. The question, therefore, is whether those documents "purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property", within the meaning of s. 17(1)(b) of the Registration Act. No authority has been cited before us in support of this contention. Partition in the

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Mitakshara sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition amongst co-sharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal language to separate himself from the rest of the family, that effects a partition, so far as he is concerned, from the rest of the family. By this process, what was a joint tenancy, has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition, and is, thus, within the mischief of s. 17(1) (b), the material portion of which has been quoted above. But partition in the former sense of defining the shares only without specific allotments of property, has no reference to immoveable property. Such a transaction only affects the status of the member or the members who have separated themselves from the rest of the coparcenary. The change of status from a joint member of a coparcenary to a separated member having a defined share in the ancestral property, may be effected orally or it may be brought about by a document. If the document does not evidence any partition by metes and bounds, that is to say, the partition in the latter sense, it does not come within the purview of s. 17(1) (b), because so long as there has been no partition in that sense, the interest of the separated member continues to extend over the whole joint property as before. Such a transaction

does not purport or operate to do any of the things referred to in that section. Hence, in so far as the documents referred to above are evidence of partition only in the former sense, they are not compulsorily registrable under s. 17, and would, therefore, not come within the mischief of s. 49 which prohibits the reception into evidence of any document "affecting immoveable property". It must, therefore, be held that those documents have rightly been received in evidence for that limited purpose.

Lastly, it was contended that if those documents of the year 1892 are admissible to prove separation amongst the three brothers, then, on the death of one of the three, namely, Rama, and of their mother, the entire ancestral properties including the mortgaged properties, vested in the two brothers in equal shares. Both by the auction-purchase of the year 1906 (D-57-D) and the sale deed (exhibit D-54 of the year 1909), Sadashiv's moiety share in the mortgaged property, was purchased by Fulchand aforesaid. The plaintiff, therefore, could only claim the other moiety share of her father, Gundi. In our opinion, there is no answer to this contention because it is clear upon a proper construction of the three mortgage-bonds and on the plaintiff's own case that the entire ancestral properties and not only Gundi's share, had been mortgaged. The appeal will, therefore, be allowed to the extent of the half share rightly belonging to Sadashiv, and the decree for possession after redemption will be confined to the other half belonging to the plaintiff's father.

In the result, the appeal is allowed to the extent indicated above. As success between the parties has been divided, they are directed to bear their own costs throughout.

Appeal allowed in part.