

The Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.) delivered the following

[401] Judgment:—By moving the Court to appoint a Commissioner, the appellants impliedly undertook to pay a fair remuneration to the Commissioner for his services, and although it was competent to the Court to require that a sum should, for this purpose, be deposited, the omission to exercise this power does not debar the Commissioner from recovering his remuneration from the party at whose instance he was engaged.

The subsequent order of the Court that the then defendant should bear the costs of the commission was irregular. If the appellants had paid the costs of the commission, they might have moved the Court to review its order as to costs, so as to enable them to recover from the then defendant, in execution of decree, the amount paid by them as the remuneration of the Commissioner.

We dismiss the appeal with costs.

[4 Mad. 401]

APPELLATE CIVIL.

The 10th January, 1882.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE
MUTTUSAMI AYYAR.

Siva Bhagiam.....(Defendant), Appellant
and
Palani Padiachi.....(Plaintiff), Respondent.*

Sale in execution of mortgage decree against widow of Hindu, quâ representative of mortgagee, not binding on son's widow.

A Hindu having mortgaged family property died leaving a widow and a son him surviving. The son died leaving a widow, the defendant. The mortgagee then sued the widow of the father, as his representative, and the property was sold and bought by the plaintiff in execution of the decree obtained against her. The plaintiff having been dispossessed by the defendant sued to recover the land:

Held that the defendant was not bound by the decree or sale and that the plaintiff was not entitled to recover.

The General Manager of the Durbbhanga Raj v. Maharajah Coomar Ramaput Singh distinguished (14 M. I. A., 605).

ONE Soka Padiachi mortgaged certain lands to Vedagiri Mudali, who, after the death of Soka and of his son Govinda, brought a suit, No. 124 of 1876, against Menachi, the widow of Soka, to **[402]** recover his debt by sale of the property mortgaged. The land was sold and the plaintiff bought it in June 1877 and was put into possession by the Court.

* Second Appeal No. 643 of 1881 against the decree of J. H. Nelson, District Judge of South Arcot, confirming the decree of Adiappa Chettiar, Subordinate Judge of Cuddalore, dated 17th May 1881.

The defendant (a minor), the widow of Govinda having brought a suit against *Menachi* for possession of the family property and succeeded, dispossessed the plaintiff.

The plaintiff now sought to recover possession of the land he had purchased from the defendant.

Both the Subordinate Judge and District Judge considered the defendant bound by the decree and sale in Suit No. 124 of 1876 and decreed for the plaintiff.

The material portion of the judgment of the District Judge was as follows:—

“What alone was seriously argued was the question whether the infant defendant, being the widow of the son and successor of the obligor, can be held to be obliged by the decree made against her mother-in-law in a suit to which she was no party, and in which her claims as successor were ignored. The defendant urges that she is the sole heiress of her husband to the exclusion of her mother-in-law, and, therefore, she and not her mother-in-law should have been sued for payment of the debt. And, further, the defendant urges that all that could be sold by the Court was the right, title, and interest of her mother-in-law which amounts to nothing.

“The questions involved (some of them very serious questions) have not been exhaustingly dealt with. Indeed, for the most part they have not been touched. It will be sufficient, therefore, for me to indicate very briefly my reasons for agreeing with the Lower Court.

“The debt being really due, and the estate left by the deceased obligor being answerable for it, the obligee brought a suit virtually against the estate, and, in doing so, named the obligor's widow as the proper person to protect the estate and resist any excess of demand. The question appears to me to be, whether the obligee made a mistake in so acting, whether, in short, the infant widow, who is so young that she never lived with her husband, was a person more proper than her mother-in-law to be designated protectress of the estate. I think this question must be answered in the negative.

“It is possible that the plaintiff may be right in assuming that she is the sole heiress of her husband, and her mother-in-law is to be wholly excluded from the inheritance, if any. But this is by no means certain. For the parties are Padiachies and we do not know what their legal usages may be. And, in any case, the mother-in-law must have a right to maintenance, which right if the estate is very small, and such appears to be the case here, may be more than tantamount to a right to a share. And this being so, the mother-in-law might justly claim to be entitled to protect the remains of the estate on her own account.

“Then again, on the hypothesis that the obligor and his wife and son formed a joint family, I take it that upon the death of the son the mother must be held to have succeeded naturally to the management of the family affairs. And, being the manager, she would rightly be sued for payment of money due by the family.

[403] “Whether the defendant and the mother-in-law ultimately elect to go shares, as so commonly happens in Indian families, or whether the maintenance of the mother-in-law and the cost of litigation swallow up everything, or whatever state of things may hereafter come about, it seems to me to be clear and indisputable, that the plaintiff has no cause of complaint in respect to the course taken by the obligee of the hypothecation-deed.”

The defendant appealed to the High Court on the grounds that she was no party to the suit which resulted in the sale to plaintiff; that *Menachi* was not sued as her guardian but as *Soka's* representative; and that the ordinary Hindu Law ought to have been applied by the District Judge in the absence of any allegations in proof of special custom at variance with such law.

Bhashyam Ayyangar for Appellant.

Balaji Rao for Respondent.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

Judgment:—The land in suit was mortgaged by the appellant's father-in-law to one Vadagiri Mudali.

Subsequently to the mortgage the mortgagor died leaving a son, the appellant's husband. This son also died, and, after his death, the mortgagee brought a suit on the mortgage impleading the widow of the mortgagor as his representative.

The appellant was not a party to the suit. A decree was obtained, and the hypothecated property brought to sale.

The respondent, the purchaser, claims in this suit to recover possession from the appellant.

The appellant cannot, under the circumstances, be bound by the decree nor by the sale obtained under the decree.

The estate had, on the death of the mortgagor, become the sole property of his son, and, on the death of the son, the property of the appellant subject, it may be, to the mortgage. In order to obtain an order for sale binding on the appellant, she should have been impleaded. She was entitled to have notice of the claim to resist it if it was not a proper charge on the estate she had inherited from her husband, or to satisfy it and save her interest from sale if the charge was a proper one.

In *The General Manager of the Durbhunga Rai v. Maharajah Coomar Ramaput Singh* (14 M. I. A., 605), the wife of the deceased obligor of a [404] bond was impleaded as her husband's representative and as the guardian of her son. It was pleaded on behalf of the son that he was not his father's representative, and that the widow was the sole heiress, and the plea succeeded. It would not have been equitable to allow him subsequently to rely on his representative character to defeat a sale in execution of the decree.

The appeal is decreed, and the decrees of the Courts below reversed and the suit dismissed with costs.

NOTES.

[There must be substantial representation, otherwise the proceedings are not binding:— (1885) 9 Bom., 429; (1888) 11 Mad., 408.]

[4 Mad. 404.]

ORIGINAL CIVIL.

The 17th January, 1882.

PRESENT :

MR. JUSTICE KERNAN.

Manickavelu Mudali and another.....Plaintiffs

and

Arbuthnot and Co.....Defendants.*

*Creditor's trust-deed—Unclaimed dividends, no provision for redistributing—
Suit for distribution.*

Where a creditor's trust-deed contained no provision for redistribution of unclaimed dividends and a suit was brought by the representatives of one of the creditors, party to the

* Civil Suit No. 109 of 1881 on the Original Side of the High Court.