

MUTTVADU-
GANATHA
TEVAR
v.
PERIASAMI

“such property and the succession to it, *indicia* of co-ownership “and consequent survivorship.” But can the plaintiff be held to have been a co-owner of the zamindari with Dora Singha Tevar? for it is only in case of co-ownership that there can be a right of survivorship. As pointed out by the Subordinate Judge, plaintiff and Dora Singha Tevar are the sons of different fathers and consequently members of different Hindu families, and therefore not coparceners within the meaning of the Hindu law. The claim by right of survivorship has, therefore, been rightly rejected; and as the last male owner from whom the right of succession is to be traced is Dora Singha Tevar, the Subordinate Judge is right in holding that the son, the defendant, and not the plaintiff, is the person entitled to succeed to the zamindari.

This appeal fails, therefore, and is dismissed with costs

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SAH MAN MULL AND ANOTHER (PLAINTIFFS),

APPELLANTS,

v.

KANAGASABAPATHI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 244, 294, 308, 622—Sale in execution—Purchase-money and judgment-debt set off against each other—Representative of decree-holder—Appeal—Revision.

One who had attached a decree and obtained leave to bid at the sale of land ordered to be sold in execution, and to have the purchase-money and the amount due under the decree set off against each other, became the purchaser for a sum less than the amount due under the decree. The Court made an order under Civil Procedure Code, s. 308, cancelling the sale and ordering a re-sale on the ground the purchaser had not paid the full amount due on his purchase within the time limited. The purchaser preferred a revision petition under Civil Procedure Code, s. 622 :

Held, (1) that the petitioner was the representative of the decree-holder within the meaning of Civil Procedure Code, s. 244, and might have preferred an appeal against the order sought to be revised ;

(2) that the petition for revision was accordingly not maintainable, although, under the circumstances above stated, the Court had no jurisdiction to make an order under Civil Procedure Code, s. 308.

* Letters Patent Appeal No. 37 of 1891.

PETITION under Civil Procedure Code, s. 622, praying the High Court to revise the order of S. T. McCarthy, District Judge of Chingleput, dated 21st February 1890, cancelling the sale to the petitioner of certain land which had been brought to sale in execution of the decree in original suit No. 2 of 1884 and ordering a re-sale.

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The above order was made on the ground of non-payment of the purchase-money in full within the period fixed for its payment.

The petitioner had attached the decree in question and had obtained, under Civil Procedure Code, s. 294, leave to bid at the execution sale, and to have the purchase-money and the amount due under the decree set off against each other.

The petition came on for hearing before PARKER, J., who made an order dismissing it.

The petitioner preferred this appeal under section 15 of the Letters Patent.

The appeal came on for hearing before MUTTUSAMI AYYAR and BEST, JJ.

Mr. R. F. Grant for appellants.

Bashyam Ayyangar and *Sadagopachariar* for respondent.

ORDER.—“It has been urged before us that the amount “actually due under the decree on the date of sale, and which “the decree holder was permitted under section 294 of the Code “of Civil Procedure to set off, exceeded the purchase-money and “that the Judge, therefore, had no jurisdiction to set aside the “sale under section 308 and to order a re-sale.

“Reading the above two sections together, we are of opinion “that this contention is well-founded.

“Before, therefore, disposing of this appeal, we must ask the “Judge to ascertain what was the amount due under the decree at “the date of the sale, including interest to that date and costs of the “execution proceedings.

“The finding to be submitted within three weeks from the date “of the receipt of this order, and seven days after posting the find- “ing in this Court will be allowed for filing objections.”

The District Judge, in compliance with the above order, returned his finding, which was to the effect that the amount due under the decree was Rs. 26,596, and the purchase-money was Rs. 24,409.

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This appeal having come on for final hearing, the parties being represented as before, the Court delivered judgment as follows:—

JUDGMENT.—It is contended that, as an appeal lies from the order made by the District Judge, the appellant's petition under section 622 was not maintainable, and that, therefore, it was properly rejected. It must be conceded that the order is appealable under section 244 of the Code of Civil Procedure—*Vallabhan v. Panguuni*(1) and *Muttia v. Appasami*(2).

It is urged on behalf of respondent that as he is not an assignee of the decree, but one who attached it under section 273, the above rulings are not applicable. This, however, makes no difference in principle, as one who attaches a decree is the decreeholder's representative within the meaning of section 244, as was also held by the Calcutta High Court in *Peary Mohun Chowdhry v. Romesh Chunder Nundy*(3).

It is further contended that the objection that the District Judge's order is appealable was not urged before the learned Judge or before us when we made our former order. This is true; but the objection is one that goes to the jurisdiction of the Court to interfere at all under section 622. We must, therefore, entertain the objection.

The learned Judge's order dismissing the petition was, therefore, correct; but it should have proceeded on the ground that the application under section 622 could not be entertained, the order objected to being appealable.

We dismiss this appeal, but, under the circumstances, without costs.

(1) I.L.R., 12 Mad., 454.

(2) I.L.R., 13 Mad., 504.

(3) I.L.R., 15 Cal., 371.
