

QUEEN-  
EMPRESS  
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offences under the Police Act XXIV of 1859. The incorporation of sections 3 and 4 of Madras Act III of 1889 in Act XXIV of 1859 does not, therefore, now render the provisions of sections 40 and 64, Indian Penal Code, inapplicable.

We think the sentences are not open to any legal objection.

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## APPELLATE CIVIL.

*Before Mr. Justice Best and Mr. Justice Subramania Ayyar.*

1895.  
April 28, 30.

AJIJUDDIN SAHIB (PETITIONER), APPELLANT,

v.

SHEIK BUDAN SAHIB (COUNTER-PETITIONER No. 2),  
RESPONDENT.\*

*Transfer of Property Act—Act IV of 1882, s. 43—Subsequently acquired interest of mortgagor—Mortgage—Decree against mortgagor's unascertained shares—Subsequent inheritance by the mortgagors of the share of a co-owner—Property belonging to a Muhammadan woman and her four children mortgaged by her and one of her sons to secure the repayment of a loan.*

A Muhammadan woman together with her eldest son executed a mortgage comprising the whole of an estate in which her younger children were also entitled to certain shares. The mortgagee brought his suit on the mortgage joining as defendants the younger children as well as the mortgagors and obtained a decree, whereby the mortgage amount was made payable "on the responsibility of the "shares" of the co-mortgagors; the suit was otherwise dismissed and no personal decree was passed. Subsequently the shares of the co-mortgagors were increased by inheritance from one of the other defendants who died before the decree was executed:

*Held*, that the increased shares of the mortgagors were liable to be sold in execution of the decree.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in appeal against order No. 40 of 1893, modifying the order of S. Raghunathayya, District Munsif of Mangalore, on execution petition No. 160 of 1893.

Application by the assignee of the decree-holder for execution of the decree in original suit No. 76 of 1890.

A Muhammadan woman and her eldest son mortgaged the whole of certain land in which her three younger children were also entitled to certain shares. The mortgagee filed original suit

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\* Appeal against Appellate Order No. 9 of 1894.

No. 76 of 1890 against the mortgagors as defendants Nos. 1 and 2 and the three other children of the first mortgagor. He obtained a decree which provided that the debt sued for should be recovered "on the responsibility of the first and second defendants' shares" in the land in question. The suit was dismissed as against the three last-mentioned defendants and no personal decree was passed. One of the younger defendants having died, the assignee of the decree now sought to bring to sale in execution the shares of the mortgagors in the property including such rights as they acquired by inheritance from the deceased. The mother did not oppose the application and objections raised by the second defendant were overruled by the District Munsif who passed an order as prayed. This order was modified on appeal by the District Judge, who held that the share of the judgment-debtor inherited from the deceased was not liable to satisfy the decree.

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The judgment-debtor preferred this second appeal.

*Ramachandra Rau Saheb* for appellant.

*Sankaran Nayar* for respondent.

BEST, J.—The appellant is assignee of the decree in original suit No. 76 of 1890, which directed that the amount decreed should be recovered on the responsibility of the first and second defendants' shares in the land mortgaged by the bond on which that suit was brought.

That bond was executed by the first and second defendants (mother and son) on account of a debt contracted by the former's deceased husband, the father of second defendant. Three other children of first defendant were also joined as defendants in that suit, but they and their shares in the property were exonerated from liability for the debt.

Since the passing of the decree, one of those three children of first defendant has died and the decree-holder applied to have attached and sold in execution of his decree not only the  $\frac{2}{3}$  share in the mortgaged property to which the first and second defendants were entitled at the date of the decree, but also the shares which have now devolved on the above two defendants out of the share of the deceased fifth defendant.

The District Munsif ordered attachment as prayed by the decree-holder, but, on appeal by second defendant, the District Judge has ordered the release from attachment of the share inherited by second defendant in consequence of his brother's death.

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First defendant has not appealed from the District Munsif's order. The question, therefore, is confined to the share inherited by second defendant from his deceased brother; and the answer to the question depends upon whether the decree must be held to limit the liability of second defendant to the share possessed by him in the mortgaged property at the date of the decree.

In support of appellant's contention that such is not the case, we have been referred by his Vakil to section 43 of the Transfer of Property Act, and to the decision of the High Court of Calcutta in *Deolie Chand v. Nirban Singh*(1).

Both section 43 of the Transfer of Property Act and the case in *Deolie Chand v. Nirban Singh*(1) are noticed by the District Judge, but he apparently thinks the latter case not in point, as he presumes the decree in that case was for the fourteen annas share mortgaged, or at any rate for the mortgaged property. But on a careful perusal of the judgment in that case it is seen that the two annas share then sought to be taken in execution of the decree was, at the date of the mortgage, held by the decree-holder, and obviously could not be subject to the mortgage at the date thereof. That two annas share was in fact only acquired by the judgment-debtors in that case in June 1865, the decree having been passed against them in October 1863. It is further clear that the fourteen annas share that had been mortgaged was made up of the twelve annas share, already purchased by the decree-holder in execution of another decree, plus a two annas share which was subsequently found to belong to one Ajoodhya Pershad.

The report and the judgment are not quite consistent as to the facts, but that the understanding of the facts on which the learned Judges proceeded was as above stated, is apparent from the opening sentence of the judgment from which I have quoted above; and that such was also the contention of the judgment-debtors is apparent from page 254 where it is stated that the "judgment-debtors contended objecting that the two annas share in question was altogether distinct from the fourteen annas share mortgaged, yet it was held that the decree-holder was equitably entitled to have security, as far as it is possible for the debtor to give it, up to the extent of the fourteen annas for which he contracted."

In the case before us it is not denied that the additional share now sought to be taken in execution was included in the mortgage

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(1) I.L.R., 5 Cal., 253.

executed by the respondent (second defendant) and his mother for the debt contracted by respondent's father, and it seems to me that there is nothing in the decree to prevent so much of the share of fifth defendant in such property as has subsequently devolved on first and second defendants being taken in execution of the decree; and the words of section 43 of the Transfer of Property Act "at any time during which the contract of transfer subsists" are, in my opinion, wide enough to cover the present case, the contract has no doubt merged in the decree; but it must be held to subsist all the same, till the mortgage is satisfied and the mere fact of the share in question having devolved on respondent subsequent to the decree appears to me to be no reason for holding section 43 of the Transfer of Property Act to be inapplicable. I would, therefore, allow this appeal and setting aside the order of the Lower Appellate Court restore that of the District Munsif.

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Respondent must pay appellant's costs in this Court and also in the Lower Appellate Court.

SUBRAMANIA AYYAR, J.—Considering that the respondent and another originally mortgaged to the appellant the whole of the land specified in the schedule attached to the decree and not merely the shares which belonged to the mortgagors at the date of the mortgage I am unable to say, with confidence, that the intention of the District Munsif, who passed the decree was, so far as the mortgagors themselves were concerned, to render nothing more than their shares liable for the decree amount. I agree therefore in holding that the order of the District Judge should be set aside and that of the District Munsif restored.

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