

SAMI
 AYYANGAR
 v.
 PONNAMMAL.

The next question is whether the mortgage is binding on the son in respect of his share. It is argued for the appellant that, the father having borrowed money not prior to the mortgage but only at the time of the mortgage, the debt cannot be considered to be an antecedent debt so as to come within the rule in the Privy Council case *Suraj Bansi Koer v. Sheo Persad Singh*(1). This is the view taken by this Court in *Srinivasa Ayyangar v. Ponnammal*(2) and *Chinnayya v. Perumal*(3). The respondent refers us to the case reported as *Khalilul Rahman v. Govind Pershad*(4) in which it was held that even in circumstances such as those of the present case, the mortgage will be enforced against the son's share as well as against that of the father. We do not find any sufficient grounds for differing from the rule hitherto followed by this Court, viz., that in order to justify a sale or a mortgage by a father so as to bind the son's share, there must be, in fact, an antecedent debt, i.e., a debt, prior to the mortgage or sale.

We must, therefore, allow the appeal with costs, and modify the decree of the Lower Appellate Court accordingly, but this will not affect the right of the plaintiff to proceed against the son's share in execution of the decree, treating it as a mere money decree. We make no order as to costs in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

ABDUL RAHIMAN AND OTHERS (PLAINTIFFS), APPELLANTS,
 v.
 MAHOMED KASSIM (DEFENDANT), RESPONDENT.*

1897.
 August 6.

Civil Procedure Code—Act XIV of 1882, ss. 244, 337 (a)—Order directing the release of judgment-debtor—Appeal.

A judgment-debtor, who had been arrested in execution of a decree of a District Munsif, made an application for his release under Civil Procedure Code, section 337 (a), and his application was granted:

Held, that an appeal lay against the order granting the application.

(1) I.L.R., 5 Calc., 148. (2) Letters Patent Appeal No. 12 of 1893 unreported.
 (3) I.L.R., 13 Mad., 51. (4) I.L.R., 20 Calc., 328.

* Appeal against Appellate Order No. 1 of 1897,

ABDUL
RAHIMAN
v.
MAHOMED
KASSIM.

APPEAL against the order of W. J. Tate, District Judge of Salem, in Appeal No. 161 of 1894, which was preferred against the order of J. M. Nallasami Pillai, District Munsif of Tiruppattur, made on execution petition No. 161 of 1894.

The petitioner was the judgment-debtor in Original Suit No. 681 of 1888, and he applied under sections 337 and 337 (a) for an order directing his release and staying the execution of the decree, pending a second appeal which had been preferred to the High Court. The District Munsif made an order directing the applicant's release under Civil Procedure Code, section 337 (a). The decree-holder appealed to the District Judge, who held that no appeal lay.

The decree-holder preferred this appeal to the High Court.

Seshagiri Ayyar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—Though the order of the District Munsif was passed under the authority given to him by section 337 (a), Civil Procedure Code, yet it was none the less an order in a question arising between the parties to the suit and relating to the execution of the decree so as to fall within section 244 (c), Civil Procedure Code. Such order is a decree under section 2 of the Code, and is therefore open to appeal.

We must, therefore, set aside the order of the District Judge, and remand the appeal for disposal on the merits. Costs will abide and follow the order of the Lower Appellate Court.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.*

BOJJAMMA (PLAINTIFF No. 2), APPELLANT,

v.

VENKATARAMAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Negotiable instrument—Benami transaction—Right of benamidar to sue.

The payee and holder of a promissory note is not debarred from suing on it by reason of the fact that a third person is really interested in it.

* Second Appeal No. 490 of 1896.