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did not come within the purview of the rule applicable to grants made antecedent to 1790. We think, therefore, that even assuming that the burden of proof lay upon the defendant, there is enough in the resumption proceedings to show that this grant was an invalid grant executed antecedent to 1790, and that after resumption and settlement, it became a dependent *taluq*, to be held at a fixed rate of rent for ever, and therefore protected from enhancement. These appeals must therefore be dismissed with costs.

*Appeals dismissed.*

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*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.*

1884 June 26.

NOBIN CHANDRA ROY (PLAINTIFF) v. MAGANTARA DASSYA AND ANOTHER (DEFENDANTS).*

*Hindu Law—Joint owners—Suit against one sharer—Decree against property—Claim by other co-sharer allowed—Suit against both sharers—Res-judicata.*

Through ignorance of the position of affairs, one only of two persons, joint owners in a property, was sued for a debt for which the property had been pledged by the person sued, and a decree was obtained and execution issued against the property; and in such execution proceedings the other sharer put in a claim, and obtained an order releasing her share of the property from attachment. A second suit was then brought by the judgment-creditor against both sharers, for the purpose of making the share of the co-sharer, who had not been previously sued, available to satisfy the defendant, and praying that the order releasing the property from attachment might be set aside; *held* that such a suit would lie, and would not be barred *as res-judicata*.

IN December 1880 one Nobin Chandra Roy brought a suit against one Chunilal, who had executed a *karbarnama* dated the 25th Srabun 1285 B.S., in the plaintiff's favour, under which certain properties had been given as security for a loan account, which was opened for the purposes of Chunilal's business. Nobin Chandra Roy, in August 1880, obtained a decree against Chunilal, making the property secured under the *karbarnama* liable, and in execution this property was attached.

* Appeal from Original Decree No. 321 of 1884, against the order of Babu Motilal Sarkar, Roy Bahadoor, Subordinate Judge of Rungpore, dated the 18th of September 1882.

On the 20th Pous 1287, one Magantara applied in the execution proceedings to have an eight-anna share in this property released from attachment, stating, that she was the widow of one Ram Chand Saha who had been a trader, and that the properties attached, had been acquired by him when carrying on his business; that Ram Chand Saha on his death left him surviving herself (his widow), and two minor sons, Chunilal and Ananda; that the business of Ram Chand after his death was carried on by a gomasta, on behalf of his two sons; that one of these sons, Ananda, died unmarried, and that his share in the business and in the properties acquired thereby thereupon devolved on her, the claimant; and that the gomasta carried on the business on her behalf, and on that of Chunilal, until Chunilal took upon himself the management, and on this statement she asked that her eight-anna share might be released from attachment.

The Subordinate Judge found that after the death of Ram Chand, his family continued joint, and that on Chunilal obtaining his majority he took upon himself the management of his own affairs, and increased the business, by lending out money and other means. But, he also found, that the claim put forward by Magantara was not made against any of the properties acquired by Chunilal after he obtained majority; and inasmuch as she had not been made a party to the suit brought by Nobin Chandra Roy, he allowed her claim.

On the 2nd May 1882, Nobin Chandra then brought this present suit against Chunilal and Magantara, stating that they were joint in food and property, and that Chunilal was the manager of the joint family, and that he, as manager, executed the *karbarnama* of Srabun 1285 B.S. as security for advances made to him, and that at the time he brought the former suit against Chunilal, he was unaware that he had any co-sharer, and he asked (1), that it might be declared that Magantara and sixteen annas of the properties in dispute were liable for the advances made; (2) that the order of the Subordinate Judge, setting aside the attachment on the application of Magantara, might be set aside; and that the property formerly attached might be sold.

The defendant, Magantara, contended that she was not liable on account of the *karbarnama* executed by Chunilal; that her husband's

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business consisted of the sale of spices and pepper, and that the property which his minor sons had acquired, was acquired in such business; and that Chunilal had opened out a large business on his own account, and had borrowed the money sued for on account of such business, and that she had no share in such business, and had given no authority to Chunilal to mortgage her interest in the properties settled under the *karbarnama*.

The Subordinate Judge dismissed the suit, on the ground that it was barred by s. 13 of the Civil Procedure Code, the former suit having been brought on the same *karbarnama*; and, further, that it was barred by s. 43 of the Procedure Code, as the plaintiff might have sought in the former suit the remedy which he now sought in this suit.

The plaintiff appealed to the High Court.

Mr. *Evans* (with him Baboo *Mokunda Nath Roy*) for the appellant contended that the former judgment did not bar the present suit, inasmuch as Magantara was no party to the former suit, and the question of the present liability of her share was not tried therein; that neither was it barred by s. 43, because that section has reference to the subject-matter of the claim, and not to the persons against whom it is made. No part of my cause of action was omitted in my previous suit. My suit then was on the *karbarnama* executed by Chunilal alone, and I did not know of any other co-sharers. My cause of action now is a perfectly distinct one, it is on the *karbarnama* as signed by Chunilal as manager on behalf of himself and his co-sharer.

Baboo *Okhil Chunder Sen* for the respondent.

The judgment of the Court (GARTH, C.J., and BEVERLEY, J.) was delivered by GARTH, C.J.

The facts of this case are as follows:—

One Ram Chand Saha, a trader in Rungpore, died some years ago, leaving a widow (the defendant No. 1), and two minor sons, Chunilal (the defendant No. 2) and one Ananda, who died during his minority.

Ram Chand in his lifetime carried on a family business, which was admittedly continued for a time after his death by a gomasta; but on Chunilal's attaining his majority, he took the management

into his own hands, and carried on that, or a different business, or both. The nature of the business which he did carry on, is one of the questions of fact raised in the case.

On the 25th of Srabun 1285, Chunilal executed a *karbar-nama* in the plaintiff's favour, mortgaging certain property as security for a loan account, which was opened for the purposes of his business. The plaintiff having sued upon this account, obtained a decree against the mortgaged property, but on proceeding to a sale, he was met by an objection on the part of the defendant No. 1, who claimed a half share in the property, as the heir of her deceased minor son, Ananda. Her claim having been allowed in the execution proceedings, the plaintiff brought the present suit for the purpose of enforcing his decree against the widow's share in the mortgaged property. The lower Court has dismissed the suit on a preliminary ground, holding that it is barred by ss. 13 and 43 of the Code of Civil Procedure. The Subordinate Judge considers that the suit is barred by s. 13, because it is based on the same cause of action as the former suit against Chunilal; and by s. 43, because the plaintiff might have included in the former suit the claim which he makes in this suit.

We think that this view of the Subordinate Judge proceeds upon a misunderstanding of the law. As regards s. 13, the case may be disposed of in a few words. In order that a subsequent suit may be barred under that section, it is necessary not only that the parties should be the same, but that the subject-matter of the suit should have been directly and substantially in issue in the former suit. Now, the defendant No. 1 in the present case, was no party to the former suit; and the question of her personal liability, or of the liability of her share in the mortgaged property to answer for the debt of the defendant No. 2, was not in issue in the former suit. The former judgment, therefore, is not a bar to this suit under the provisions of s. 13.

Nor is the suit open to objection under s. 43; because that section has reference to the *subject-matter* of the claim, and *not to the persons* against whom it may be made. It is true, that if the only object of the suit had been to charge the defendant No. 1, with the same liability as was charged upon the defendant

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No. 2 by the former decree, it would have been open to the objection upon which the case of *Kendall v. Hamilton* (1) and the other cases which were cited during the argument were decided.

But it was by no means the only object of the suit to fix the defendant No. 1 with that liability. That undoubtedly is the subject of the first prayer in the plaint. But the second prayer is, that the order of the 3rd of May 1881 (in the execution proceedings) may be set aside, and that the whole of the mortgaged property may be declared liable to be sold in execution of the former decree obtained against the defendant No. 2. This claim (except so far as it seeks to set aside the order of the 3rd of May), is a perfectly legitimate one, and is not open to the objection, which is fatal to the first claim.

The Subordinate Judge seems hardly to have realised the nature of this second prayer, and none of the issues which have been framed (except the first which is in a general form) are calculated to raise the question involved in that prayer.

Of course, if in point of fact the defendant No. 1 is right in her contention, that she had nothing to do with the business carried on by the defendant No. 2, and that the defendant No. 2 had no authority, express or implied, to mortgage her share of the property, the suit of the plaintiff must be dismissed upon the merits.

But if, on the other hand, the defendant No. 1 was a partner in the business carried on by the defendant No. 2, or if not being a partner, she consented, expressly or impliedly, to the mortgage being made, or even, if she knowingly stood by and allowed the defendant No. 2 to pledge the whole property to the plaintiff without objection, the claim made by the plaintiff in the second prayer of his plaint might prove to be well-founded. Whether it is so or not, appears to be a question of fact, which the Subordinate Judge will have to decide, when the case goes back for trial upon the merits.

But, as a matter of law, there seems no objection to the claim thus made by the plaintiff. It is one of a totally different nature from that which is made in the first prayer; and it is in

(1) L. R., 4 App. Cas., 504.

fact the only means open to the plaintiff of correcting the error, if it is one, which has been made in the execution proceedings.

It is clear, that if two out of three partners are sued for a debt due from the partnership, and a decree is obtained against those two, and execution issues against the partnership property, if the third partner should apply successfully in the execution proceedings to have his share in the property released, the plaintiff's only remedy would be a regular suit, not for the purpose of making the third partner *personally liable* for the debt, but for *the purpose of making the share of the third partner available to satisfy the decree.*

The case will be remanded to be tried upon its merits; and the lower Court will frame, if necessary, an additional issue or issues. The appellant will have the costs of this appeal.

*Case remanded.*

## ORIGINAL CIVIL JURISDICTION.

*Before Mr. Justice Pigot.*

### REMFRY *v.* DE PENNING AND ANOTHER.

1884
*July* 23.

*Indian Succession Act (X of* 1865), *s.* 282—*Judgment-creditor—Execution of Decree—Priority—Executor—Administrator—Administrator-General's Act (II of* 1874), *s.* 35.

A decree for money was obtained against a person who afterwards died intestate. Letters of administration to his estate were granted to the Administrator-General of Bengal. The decree-holder applied for execution of his decree against the assets in the hands of the Administrator-General.

*Held,* that he was entitled to have his decree satisfied out of the assets of the deceased, although those assets were not sufficient to pay in full all the claims made against the estate.

IN this case, a decree was obtained on the 2nd of May 1879 against Peter De Penning and John Biddle for Rs. 5,500 and costs. John Biddle died on the 12th of August 1883, and on the 7th of March 1884 the Administrator-General of Bengal obtained letters of administration to his estate. On the 10th of June 1884 the plaintiff obtained a rule, calling upon the Administrator-General of Bengal, as administrator of the estate of John Biddle, to show cause why the decree should not be executed against him. It was admitted that Biddle was domiciled in British India at his death.