Before Mr. Justice Mitter and Mr. Justice Agnew.

1886
January 14.

KAMESHWAR PERSHAD (DECREE-HOLDER) *v.* RUN BAHADUR SINGH (JUDGMENT-DEBTOR.)*

Civil Procedure Code (Act XIV of 1882), *s.* 244, *cl.* (*c*)—*Execution of decree—"Representative" of judgment-debtor.*

The word "representative" as used in cl. (*c*), s. 244 of the Code of Civil Procedure, means any person who succeeds to the right of any of the parties to the suit after the decree is passed.

A Hindu widow mortgaged certain properties, and afterwards by an *ekrarnamah* made them over to *B* the next heir. The *ekrarnamah* contained a condition that *B* was to be liable for the widow's debts. Subsequently the mortgagee brought a suit against the widow on the mortgage and joined *B* as a party, on the ground that he was in possession of the mortgaged properties. That suit resulted in a money decree being passed on appeal by the High Court against the widow personally, the property in the hands of *B* being held not to be liable. The case was taken on appeal to the Privy Council, and pending the hearing of that appeal the widow died, and *B* was brought on the record as her legal representative. The decree of the High Court was ultimately confirmed by the Privy Council. In execution of the decree it was sought to make *B* liable to satisfy the amount out of the properties which he had obtained under the *ekrarnamah*, the mortgagee not having been aware of the conditions of that document before the decree of the High Court.

Held, that so far as these properties were concerned, he was not the legal representative of the widow as he inherited them as heir-at-law of her husband, and that his title to them under the *ekrarnamah* was not that of a "representative" within the meaning of cl. (*c*) of s. 244.

Held, further that the question of *B's* liability under the *ekrarnamah* did not fall within the scope of the provisions of cl. (*c*) of s. 244, as being a question to be decided between the "parties" to the suit, as although *B* was a party to the suit, the only claim against him was that the property in his hands was liable, as having been previously hypothecated, and as the suit was dismissed so far as that claim was concerned, it was not a question relating to the execution of the decree.

THIS appeal arose out of an application for execution of a decree passed in favor of Kameshwar Pershad, the appellant.

The suit in which the decree was passed was brought by Kameshwar Pershad against Ranee Asmoth Koer, upon a mortgage bond executed by her in his favor, and the present objector Run Bahadur Singh was joined as a party defendant,

* Appeal from Order No. 236 of 1885, against the order of Baboo Kali Prasanna Mukherji, Subordinate Judge of Gya, dated the 23rd of May 1885.

upon the ground that he was in possession of the property sought to be affected, under an *ekrarnamah* executed by the Ranee on the 31st August 1872. After the date of the mortgage Kameshwar Pershad obtained a decree in the Court of first instance against both defendants, declaring amongst other things, that the property in the hands of Run Bahadur was liable to be sold to satisfy the mortgage debt, and that the Ranee was also personally liable for the amount. Each defendant preferred a separate appeal against that decree to the High Court, and Run Bahadur appealed, not only on the ground that the property in his hands was not liable, but also on the ground that there was no personal liability under the circumstances of the case on the part of the Ranee.

On the 2nd July 1878 the decree of the first Court was modified by the High Court, and the plaintiff was declared entitled to a money decree only against the Ranee personally, that portion of the decree declaring that the property in the hands of Run Bahadur was also liable to the plaintiff's claim being set aside.

Subsequent to the date of the High Court's decree the plaintiff discovered the true nature of the *ekrarnamah* of the 31st August 1872, and that it contained a condition that Run Bahadur was to be liable for and should pay the debts of the Ranee. The plaintiff upon that ground applied to the High Court for a review of its previous judgment, but his application was rejected.

He then appealed to the Privy Council, and pending the hearing of the appeal the Ranee died. Run Bahadur's name was therefore brought on the record as representative of the Ranee, but he did not appear at the hearing of the appeal, which took place on the 23rd November 1880, and which resulted in the decree of the High Court being confirmed [*see Kameshwar Pershad* v. *Run Bahadoor Singh* (1).]

It was for execution of that decree that the present application was made, and the plaintiff claimed, upon the events which had happened, to be entitled to execute his decree by the sale of the properties which had come into the hands of Run Bahadur, under the *ekrarnamah*, as under that document Run Bahadur

(1) I. L. R., 6 Calc., 843.

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had made himself personally liable for the Ranee's debts. Run Bahadur, on the other hand, contended that he had inherited the properties as the reversionary heir of the Ranee's husband, and that as the decree was a personal decree against the Ranee, it could not be executed against her husband's estate. He further contended that he was not liable under the provisions of s. 234 of the Civil Procedure Code as representative of the Ranee, as he alleged that she had left no *stridhan*, and that no portion of her estate had come into his hands as in fact he had no estate of her own.

The lower Court held that it had no jurisdiction to determine the liability of Run Bahadur to satisfy the decree under the terms of the *ekrarnamah*, such a question not coming within the provisions of s. 244 of the Civil Procedure Code; and that by executing that document the Ranee had not constituted Run Bahadur her representative within the meaning of that term, as used in cl. (c) of that section, as upon the authority of the ruling in the case of *Rashbehary Mookhopadhya* v. *Maharani Surnomoyee* (1), the Court considered that a person whose interest comes into existence prior to the decree cannot be said to be a representative of the judgment-debtor.

That Court therefore held upon the main question raised in the case that Run Bahadur could not be held liable in these execution proceedings, under the *ekrarnamah*, but it further held that as he had admitted to having received personal property to the extent of Rs. 5,000 belonging to the Ranee after her death, which he alleged that he had disposed of for the Ranee, but the necessity for the disposal of which he had not proved, he was liable under s. 234 to that extent to satisfy the plaintiff's decree.

Against that order the plaintiff decree-holder appealed to the High Court, and Run Bahadur filed objections under the provisions of s. 561 of the Civil Procedure Code to that portion of the order which declared him to be liable to the extent of Rs. 5,000.

Mr. *Woodroffe*, and Mr. *Twidale*, for the appellant.

Mr. *C. Gregory*, for the respondent.

(1) I. L. R., 7 Calc., 403.

It was contended by Mr. *Woodroffe* on behalf of the appellant that the question of Run Bahadur's liability under the *ekrarnamah* was a question which came within the terms of cl. (*c*) of s. 244 of the Code, and was one which the Court should have decided in these proceedings, because Run Bahadur was the representative of the Ranee, and as such a party to the proceedings pending the appeal to the Privy Council; and even if it was considered that it was not a question arising between the decree-holder and the representative of the judgment-debtor, it was a question arising between the parties to the suit. Run Bahadur was himself a party to the suit, and had, by appealing to the High Court against the decree of the Original Court, so far as it declared the personal liability of the Ranee, as well as by his subsequent conduct when added as party to the suit as representative of the Ranee after her death, precluded himself from contending that his liability under the *ekrarnamah* to satisfy the decree passed in the suit was not a question arising between the parties to the suit. For it was obvious that in acting as he had done, and in attempting to shield the Ranee from any personal liability, he had been all along attempting to prevent any decree being passed in the suit which he knew would have the result of fixing his liability under the *ekrarnamah*, although he, at the time, was well aware that the plaintiff did not know the conditions upon which he took the mortgaged properties under that document.

The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows:—

We are of opinion that this appeal, and the objections taken under s. 561 of the Code of Civil Procedure, must be dismissed, each party paying his own costs.

The question in the appeal turns upon the construction of s. 244, cl. (*c*) of the Civil Procedure Code, which runs thus: "Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree."

It is contended that the respondent Run Bahadur is a "representative" within the meaning of this clause, and that the question that is raised between the decree-holder and

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Run Bahadur is a question relating to the execution of the decree.

It is further contended that, supposing he was not a representative, he was a party to the suit and therefore comes within the purview of that clause. The facts of this case are briefly as follows:—The decree-holder Kameshwar Pershad brought a suit upon a mortgage bond which was executed in March 1872 by Ranee Asmedh Koer, hypothecating certain immoveable property. In the month of August 1872 an *ekrarnamah* was executed between Ranee Asmedh Koer and the respondent before us, Run Bahadur, who was the next reversionary heir of Asmedh Koer, by which the succession to the estate was accelerated, and the properties inherited by Asmedh Koer were handed over to Run Bahadur who, at the same time, by the terms of the *ekrarnamah*, undertook to pay off the debts due by her. Subsequently to the execution of this document, the suit in which the decree now sought to be executed was passed was brought, and in that suit the plaintiff Kameshwar Pershad obtained a decree in the Court of first instance. By that decree the property hypothecated in the hands of Run Bahadur was declared liable for the satisfaction of the debt in the mortgage-bond. There was a personal decree against Asmedh Koer. Two separate appeals were preferred by the two defendants respectively, and the two appeals were disposed of by this Court by one and the same judgment and decree. This Court came to the conclusion, for reasons stated in the judgment, that the mortgage was not binding upon Asmedh Koer as well as upon Run Bahadur, but it was of opinion that under the bond Asmedh Koer was personally liable. Accordingly the decree of the lower Court was varied, and it was confirmed so far as it was a personal decree against Asmedh Koer. In all other respects it was set aside. Against that decree the plaintiff Kameshwar Pershad preferred an appeal to the Judicial Committee; but before this appeal was preferred Ranee Asmedh Koer died, and Run Bahadur was substituted in her place. The appeal before the Judicial Committee was heard *ex parte*, and the decree of this Court was confirmed. That decree is now sought to be executed against Run Bahadur, and the decree-holder prays for the realization of the money due by the sale and attachment of certain properties

which came into the possession of Run Bahadur at the time the *ekrarnamah* of August 1872 was executed.

We are of opinion that upon these facts the decree cannot be executed by the attachment and sale of these properties which had been owned and held by the husband of Asmedh Koer. So far as these properties are concerned, he was not the legal representative of Asmedh Koer under the law of inheritance. He inherited these properties as the heir-at-law of Ranee Asmedh Koer's husband after the death of Asmedh Koer. Furthermore, the respondent's title as regards these properties under the *ekrarnamah* is not that of a representative within the meaning of cl. (*c*) of s. 244. The word "representative" there means any person who succeeds to the right of any of the parties to the suit after the decree is passed. If such rights are transferred by a party to the suit before decree, and if the transferee is made a party to the suit before decree, then he comes within the words "parties to the suit." The word "representative" as used in cl. (*c*) only means a person who succeeds to the right of a party to the suit after decree, and therefore the respondent is not a "representative" within the meaning of cl. (*c*), s. 244. If he is considered as a representative after the death of Asmedh Koer as having succeeded to her peculiar properties, then the decree-holder must bring the case within the provisions of s. 234, which says:—"Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of."

In the present case the decree-holder was able to prove that to the extent of Rs. 5,000 only the respondent Run Bahadur is liable under this section.

In order that the decree-holder may succeed in making a representative under this section liable, he must prove that some property of the deceased has come to the hands of the representative after the death of the party whose representative he is.

In this case the properties in dispute came into the hands of the respondent before the death of Asmedh Koer under the *ekrarnamah* of 1872.

So long as Asmedh Koer was alive, the respondent was holding these properties under the conditions of the *ekrarnamah.*

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After the death of Asmedh Koer, he became the owner of the properties as heir-at-law of Asmedh Koer's husband.

Then as regards the contention that the present case comes within cl. (c) of s. 244, because the respondent Run Bahadur was a party to the suit, it seems to us that it is not well founded, because, although Run Bahadur was a party to the suit, no decree was passed against him. He was successful. The claim against him was that the property in his hands was liable as having been previously hypothecated. That was the only claim brought against him in that suit, and so far as that claim was concerned, the plaintiff's suit was dismissed, and therefore, although he was a party to the suit, still the question that has arisen is not a question relating to the execution of *the decree* which was passed in the suit in favor of the plaintiff.

Upon these grounds we are of opinion that the lower Court is right in the view which it has taken of the meaning of cl. (c) of s. 244.

With reference to the ground which was urged under s. 561 against the order of the lower Court, it is sufficient to say that there is a clear admission on the part of Run Bahadur that he inherited properties to the extent of Rs. 5,000.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr. Justice Macpherson.

1885
August 27.

ASHANULLA KHAN BAHADUR (PLAINTIFF) *v.* RAJENDRA CHANDRA RAI, FOR SELF AND AS EXECUTOR TO THE ESTATE OF THE LATE DEBENDRA CHANDRA RAI (DEFENDANT.)*

Beng. Act VIII of 1869, s. 64—Landlord and Tenant—Sale of portion of under-tenure—Suit for arrears of rent.

There is nothing in s. 64, Beng. Act. VIII of 1869, which necessarily leads to the conclusion that under that section a share of an under-tenure cannot be sold, so as to render the sale binding upon the judgment-debtor; and there is no substantial difference between the sale of a portion of an under-tenure under that section and under the Civil Procedure Code.

* Appeals from Appellate Decrees No. 1764 and other analogous appeals of 1884, against the decree of Baboo Beni Madhub Mitter, First Subordinate Judge of Backergunge, dated the 28th of June 1884, affirming the decrees of Baboo Apurba Krishna Sen, Munsiff of Potuakhali, dated the 19th of December 1883.