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Indian Divorce Act is so consistent with the general principles upon which the matrimonial law in civilized countries should proceed that I have willingly adopted the order which he has made. That order, as I understand it, is that we should desist from confirming the decree *nisi* and prevent it from being made absolute under the peculiar circumstances of this case. I do not understand the order to set aside the decree *nisi*; and I may respectfully add that if I had not so understood it I should probably have been unable to concur in it. As the order has been made its practical effect is virtually the same as that indicated by Sir C. Cresswell in *Lewis v. Lewis* (1), that is to say, staying further proceedings relative to the confirmation of the District Judge's decree *nisi* of the 1st December, 1887, by our not confirming it.

NOTE—As to whether or not an application for a decree absolute according to the practice in the English Divorce Court, is a step in the cause, see *Ousey and Ousey v. Atkinson*, L. R. 1 P. Div. 56 and Brown, on the Law and Practice in Divorce and Matrimonial Causes, 4th Ed., p. 325.

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June 21.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

KUDHAI (DEFENDANT) v. SHEO DAYAL AND OTHERS (PLAINTIFFS).*

Execution of decree—Joint decree—Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished pro-tanto—Validity of sale and extent of rights purchased to be determined by Court executing the decree—Civil Procedure Code, s. 244 (c).

Where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only *pro-tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property.

The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property.

Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase are questions falling within the purview of clause

* Second Appeal No. 961 of 1887 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 19th March, 1887, reversing a decree of Maulvi Jaffar Husain, Munsif of Meerut, dated the 11th January, 1887.

(1) 30 L. J., P. and M. 199.

(c) of s. 244 of the Code of Civil Procedure and must be determined by order of the Court executing the decree.

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Banarsi Das v. Maharani Kuar (1), *Wise v. Abdool Ali* (2) and *Pogose v. Fakhrooddeen Mahomed Ahsan* (3) referred to.

The facts of this case are stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

Babu *Jogindro Nath Chaudri*, for the respondents.

MAHMOOD, J.—The facts of this case may be recapitulated here to indicate the questions of law which require decision in this appeal.

On the 13th June, 1882, six persons, *viz.*, (1) Musammat Premu, (2) Debi Sahai, (3) Girdhari, (4) Chand Lal, (5) Bihari, and (6) Kudhai (appellant), obtained a joint decree for possession of a house by redemption on payment of Rs. 1,043-2-0 against three persons (1) Sheo Dayal, (2) Sheo Singh, and (3) Johri Mal.

On the 5th June, 1885, Kodhai by himself applied for execution of the decree, praying for possession of only half of the house, which he claimed as his share therein. To this application objections were raised by the judgment-debtors, and during the pendency of that application the Court executing the decree allowed him to amend his application so as to seek possession of the entire house.

On the 28th August, 1885, the Court allowed Kudhai, appellant, to execute the decree in respect of the whole house on furnishing security for Rs. 869-2-8 (which represented five-sixths of the mortgage-money) to protect the interests of the other decree-holders who had not joined in the application for execution. The order was reversed in appeal by the lower appellate Court, but was restored by this Court on the 20th May, 1886 (4).

Having so far succeeded, Kudhai, appellant, having filed the requisite security applied again for execution of the decree in respect of the whole house, by an application dated 13th September, 1886, which must be taken to revive the execution proceeding commenced by him with the application of the 5th June, 1885.

Meanwhile, on the 2nd August, 1882, Musammat Premu and others who were joint decree-holders with Kudhai, sold their rights

(1) I. L. R., 5 All., 27.

(2) 7, W. R., 186.

(3) 25, W. R., 343.

(4) Weekly Notes, 1886, p. 125.

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to one Sujan Chand, who on the 21st September, 1886, sold those rights to the judgment-debtors, that is to say, to the persons who were already in possession of the house. Relying upon their purchase the judgment-debtors raised objections to the execution, contending that the rights of the decree-holder Kudhai who sought execution, in respect of the whole house, were limited to a one-fifth share, and that he could not, therefore, seek possession of more than that share. On the other hand, the appellant Kudhai, decree-holder, contended that the extent of his share was at least one-half of the whole house, and that he could execute the decree in respect of the whole house as the purchase made by the judgment-debtors was illegal, and the question had already been settled as to his right to execute the whole decree.

The Court of first instance held that the purchase made by the judgment-debtors having been made subsequent to the High Court's order of the 20th May, 1886, such purchase could not nullify the effect of that order; that the judgment-debtors are bound by that order, "and should give possession to Kudhai of the whole house"; that the question as to the extent of Kudhai's share in the house could not be determined in execution proceedings; and that "the judgment-debtors may obtain their remedy as to the determination of their shares in the house and as to the possession thereof as representatives of Premu, &c., decree-holders, by a regular suit in the same manner as their predecessors in title would have done." Upon these grounds the first Court rejected the objections of the judgment-debtors, and allowed execution to proceed in respect of the whole house.

From that order the judgment-debtors appealed to the lower appellate Court, and the learned Judge of that Court reversed the order of the first Court in a judgment which goes to show that he regarded the share of the decree-holder Kudhai to be only one-fifth in the house, though the order passed in appeal does not show that the learned Judge allowed execution of decree even to that extent.

From the order of the lower appellate Court this second appeal has been preferred, and the arguments addressed to me by the

learned pleaders for the parties raise the following questions for determination :—

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(1). Whether the purchase by the judgment-debtors of the shares of their decree-holders, Musammât Premu and others, renders the decree of the 13th June, 1882, incapable of execution in respect of the whole house, notwithstanding the order of this Court dated the 20th May, 1886, which restored the first Court's order of the 28th August, 1885, allowing execution in respect of the whole house.

(2). Whether the question as to the legality of the purchase by the judgment-debtors and the extent of the share which they so acquired can form the subject of investigation in execution proceedings such as this case.

I am of opinion that the questions so raised are not free from difficulty, principally because the Code of Civil Procedure contains no express provision to meet cases such as this. The questions, however, are not dissimilar in principle from those which arose in the case of *Banarsi Das v. Maharani Kuar* (1), where my brother Straight and I concurred in holding that when by operation of law one of several joint judgment-debtors acquires the position of decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors, and the decree cannot be executed against them, but that when one of them so acquires only a partial interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired. That was a case in which the decree was for money, but in arriving at the principle upon which that judgment proceeded we relied upon the case of *Wise v. Abdool Ali* (2), where Loch and Macpherson, J.J., held that "even if it should appear that the principal defendant has (as one of the representatives of his son) an interest as one of the decree-holders that fact will not bar execution being issued by other decree-holders according to such rights as they may be able to prove." Similarly, reference was made to the case of *Pogose v. Fukuooddeen Mahomed Ahsan* (3), where Jackson and McDonell, J.J., observed :—"We

(1) I. L. R., 5 All., 27.

(2) 7, W. R., 186.

(3) 25, W. R., 343.

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considered for a moment whether it was possible to make any distinction between the capacity in which Azim Chaudhri was the judgment-debtor and that in which he became one of the decree-holders as representing his deceased wife ; but it appears to us that the consequence as regards that share in the decree is the same as it would have been if he *had purchased the whole or a part*. We think the effect of inheritance as to a part or as to the whole is the extinction of the decree *pro-tanto*."

In both these cases, though the reports are not very clear, it would appear that the decrees were for immoveable property, and the rights of one of the decree-holders had during the pendency of execution proceedings devolved upon the judgment-debtor ; and in the latter case Sir Louis Jackson, in delivering the judgment of the Court, expressly stated that the effect of such devolution was similar to that of a purchase by the judgment-debtor of a portion of the property in respect of which the decree had been obtained.

I am of opinion that these two rulings are applicable in principle to this case, and are in accord with the juristic reasons upon which my judgment in the case of *Banarsi Das v. Maharani Kuar* (1) proceeded. The general effect of these rulings seems to me to be that where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro-tanto*. The theory of law upon which this rule proceeds is, in my opinion, sufficiently general to comprehend alike, cases in which the decree is for money and cases in which the decree awards possession of immoveable property. For instance, in a case where A and B jointly obtain a decree for money against C, and C as judgment-debtor either pays off the share of A, or purchases his share in the decree, or inherits such share from A, the result would be the extinguishment of the decree *pro-tanto*, and the remaining decree-holder B could not execute for more than his own share. This is the effect of the ruling in *Banarsi Das v. Maharani Kuar* (1), and the cases to which the ruling refers. Similarly, and on the same principle, I hold that where A and B obtain a decree

(1) I. L. R., 5 All., 27.

for possession of a house or other immoveable property against C, and C purchases or inherits the rights and interests of A in such property, the decree is extinguished *pro-tanto*, though the remaining decree-holder B can, of course, execute the decree in respect of his own share. Both classes of cases rest upon the common principle of jurisprudence that a person cannot at one and the same time unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights, and it is upon this principle that the doctrine of merger and what would in Roman law be called *confusio* proceed.

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Applying these principles to this case, I am of opinion that if the defendants-mortgagees judgment-debtors of the decree of the 13th June, 1882, have validly acquired by purchase the rights and interests of the mortgagors decree-holders Musammat Premu and others, the decree cannot, to that extent, be executed against them, because it has been extinguished *pro-tanto*, and all that Kudhai, decree-holder, appellant, could seek to recover possession of by enforcement of the decree would be such share in the mortgaged house as has not been validly purchased by the mortgagees judgment-debtors. This view does not, in any way, affect this Court's order of the 20th May, 1886, because at that time the judgment-debtors respondents had not acquired the rights of ownership in the house and were not in a position to raise the pleas which they have now set up. As already stated, Kudhai's joint decree-holders Musammat Premu and others sold their share in the mortgaged house to Sujan Chand on the 2nd August, 1882, but neither the vendors nor Sujan Chand were parties to the litigation which ended in this Court's order of the 20th May, 1886. The effect of that order no doubt is to allow Kudhai to execute the decree of the 13th June, 1882, in respect of the whole house, but at that time the judgment-debtors had not purchased a portion of the house from Sujan Chand, for the sale is dated the 21st September, 1886, and it is upon the grounds of that purchase that the plea they now raise is founded.

For these reasons I hold that the decree-holder appellant Kudhai, is entitled to execute the decree only in respect of so much of the house as has not been validly purchased by the judgment-debtors-respondents under the sale of the 21st September, 1886.

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These judgment-debtors are mortgagees in possession, and the decree of the 13th June, 1882, is a decree for redemption; and it seems to me obvious that it would be a most circuitous method to force these judgment-debtors mortgagors to receive in these execution proceedings the entire mortgage money including so much as is due by the shares which they themselves have purchased, and then to relegate them to another regular suit in which they would seek redemption of their shares from Kudhai on payment of the very money which Kudhai had paid to them in these execution proceedings. The rule of law against breaking up the integrity of a mortgage security is a rule aiming at protection of the mortgagee, but that rule does not apply to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. This rule, which has always been recognised in India, has been formulated in the last part of s. 60 of the Transfer of Property Act (IV of 1882), and although it is a rule of substantive law, the principle upon which it proceeds is, in my opinion, applicable also to adjective law, that is, rules of procedure such as those relating to execution of decrees of this character.

These observations dispose of the first question in this case as enunciated by me, and they render the decision of the second question an easy matter. The whole of that question comes to this, is the dispute as to the legality of the purchase by the judgment-debtors and the extent of the share which they so purchased a matter falling within the purview of clause (c) of s. 244 of the Code of Civil Procedure? That section, in enumerating the questions to be decided by the Court executing the decree, goes on to say in cl. (c), "any 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." Here the decree-holder appellant, Kudhai, as also the judgment-debtors respondents were parties to the suit which ended in the decree of 13th June, 1882, and which decree is sought to be executed in these proceedings, and this being so, I hold that the terms of cl. (c) of s. 244 of the Code of Civil Procedure are sufficiently wide to include such questions as those raised in this case, relating to the validity and extent of the share purchased by the judgment-debtors in the mortgaged house to which the decree relates.

But in this case neither of the Courts below has tried the case upon the merits, with reference to the question how far the decree sought to be executed has been extinguished by reason of the purchase made by the judgment-debtors-respondents on the 21st September, 1886, and till that question is decided upon the merits, it is not possible to determine to what extent the decree can be executed by Kudhai, and what amount he should pay in order to secure possession of so much of the house as has not been purchased by the mortgagees judgment-debtors respondents. And in this connection I may state that the fifth ground of appeal before me, which proceeds upon the assumption that the decree-holder Kudhai appellant had already paid the mortgage-money as provided by the decree, is also a matter relating to the merits and cannot be dealt with by this Court as a Court of second appeal.

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Under these circumstances, the proper course is to decree this appeal, setting aside the order of both the Courts below and to remand the case to the Court of first instance for disposal upon the merits, with reference to the observations which I have made. I order accordingly. Costs will abide the result.

Cause remanded.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

DEBI PRASAD (PLAINTIFF) v. RUP RAM AND OTHERS (DEFENDANTS)*

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June

Act XXII of 1881 (Excise Act), ss. 5, 12, 35, 42—License—Sub-lease—Breach of conditions of license—Consideration forbidden by law—Immoral consideration—Consideration opposed to public policy—Act IX of 1872 (Contract Act), s. 23.

The plaintiff obtained from the excise authorities a license to manufacture and sell country liquor, such license containing a condition against sub-letting the benefits of the license. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of a license granted under the Act is made a punishable offence. The plaintiff sub-let the license to defendants who on the 5th of September, 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement and it was decreed by the Court of first instance but dismissed by the lower appellate Court.

* Second Appeal No. 83 of 1887, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 6th November, 1886, reversing a decree of Maulvi Shah Ahmad-ulla Khan, Subordinate Judge of Gorakhpur, dated the 15th March, 1886.