

1888

MATADIN
v.
CHANDI DIN.

Such being the view I hold, I decree the appeal with costs, and, setting aside the order of the Subordinate Judge, direct him to dispose of the execution proceeding now pending in his Court with advertence to what I have said in the course of this judgment.

BRODHURST, J.—I concur.

Appeal allowed.

1888

February 2.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

ABDUL RAHMAN AND ANOTHER (PLAINTIFF) v. BEHARI PURI (DEFENDANT)

Suit to establish right to sell property in execution of decree enforcing hypothecation—Suit against purchasers not parties to decree—Judgment-debtor declared insolvent pending suit—Decree-holder scheduling his decree under Civil Procedure Code, s. 352—Effect of schedule not to make suit unmaintainable.

A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree and had purchased in execution of a prior decree. Pending the suit, one of the judgment-debtors under the hypothecation decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under s. 352 of the Civil Procedure Code.

Held that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree unmaintainable.

THE facts of this case were as follows:—On the 12th March, 1886, one Mata Ghulam obtained against Ram Din and Gulab Kuar a decree upon a hypothecation bond by which two palkigaris were hypothecated. The decree contained an order that the two garis were to be sold in satisfaction of the hypothecation. After this, one Goshain Behari Puri, in execution of a money decree against Ram Din, attached the same two garis and caused them to be advertized for sale, the notification announcing the lien upon the garis under Mata Ghulam's decree. He then purchased Mata Ghulam's decree. At the sale in execution of Behari Puri's original decree, one Nahori purchased one of the garis and afterwards sold it to Abdul Rahman. The other was purchased by Sukun. Behari Puri then proceeded to put in force the decree which he had purchased from Mata Ghulam by attachment of the

*First Appeal No. 126 of 1887 from an order of Pandit Hansi Dhar, Subordinate Judge of Allahabad, dated the 25th June, 1887.

two garis. To this attachment objections were raised by Abdul Rahman and Nahori, upon which, on the 31st July, 1886, the garis were released. Behari Puri thereupon instituted the present suit under s. 283 of the Civil Procedure Code to establish his right to bring the property to sale in execution of Mata Ghulam's decree.

This suit was instituted in the Court of the Munsif of Allahabad. While it was pending, Ram Din, one of the judgment-debtors under the decree obtained by Mata Ghulam, applied to the Subordinate Judge of Allahabad for a declaration of insolvency, and in his application, under s. 345 of the Civil Procedure Code, he mentioned the decree held by the plaintiff among the pecuniary claims against him. The Court issued notice to the plaintiff among other creditors, and on the 20th November, 1886 framed a schedule under s. 352 of the Code, in which the decree was entered among the debts of Ram Din.

At the hearing of this suit the Court of first instance held that the suit was unmaintainable, on the ground that, under s. 352 of the Code, the declaration of insolvency was to be deemed a decree in favour of the plaintiff superseding that which he had purchased from Mata Ghulam, and in respect of which the suit was brought, and that the plaintiff could not seek any remedy apart from the insolvency proceedings. The Court accordingly dismissed the suit. On appeal, the Subordinate Judge set aside the decree and remanded the case for retrial under s. 562 of the Code. The defendants appealed to the High Court from the order of remand.

Pandit *Sundar Lal*, for the appellants.

Munshi *Hanuman Prasad*, and Lala *Juala Prasad* for the respondent.

BRODHURST and TYRRELL, JJ.—A few facts may be stated in this matter. Two persons, Ram Din and Gulab Kuar, mortgaged certain carriages to one Mata Ghulam, who, on the 12th May, 1886, brought a suit to recover his money and obtained a decree which declared that the carriages in question were charged with the debt and were liable to sale in satisfaction of it. The respondent here is the assignee of that decree from Mata Ghulam. The respondent was himself a decree-holder against the same Ram Din mentioned above for another debt, and in execution of that decree

1888

 ABDUL
 RAHMAN
 v.
 BEHARI PURI.

1888

ABDUL
RAHMAN
v.
BHWARI PURI.

he got one of the carriages sold, and it was bought by persons who transferred it to the present appellants. The respondent in execution of that decree of Mata Ghulam attempted to enforce his charge against one of the carriages, but was defeated by an order of the Court executing the decree made on the 31st July, 1886, and that order has given rise to the present suit which has been brought under the provisions of s. 283 of the Civil Procedure Code. The respondent, against whom the order of the 31st July, 1886, was made, has instituted this action to establish the right which he claimed to the carriage in dispute, and he has coupled with this suit a claim for damages in the event of it being found that the defendants have improperly converted the carriage and made it unavailable in satisfaction of his claim.

The Court of first instance held that this action was not maintainable. The lower appellate Court reversed that finding and remanded the case for decision under s. 562 of the Civil Procedure Code. There is no doubt that that order was correct in one respect; that there were no materials on the record which would enable the Court of first appeal to determine the case for itself. But in this appeal it is contended by the defendant that the present action is unsustainable, inasmuch as the plaintiff (respondent) has had to take action under s. 352 of the Code, and because Mata Ghulam's decretal debt was scheduled in his favour by the Court exercising insolvency jurisdiction at Allahabad, the insolvent in question being Ram Din, one of the judgment-debtors under Mata Ghulam's decree.

Mr. *Sundar Lal* has argued with much force that the effect of the respondent scheduling his decretal claim under Mata Ghulam's decree against Ram Din is that Mata Ghulam's decree has been superseded and put out of existence, and that to allow the respondent to maintain the present action would be to put him in the position that, while holding a new decree in supersession of Mata Ghulam's decree, he might obtain another and independent remedy with regard to the same original debt which was the subject of the decree of the 12th May, 1886.

It seems to us that there is more ingenuity than force in this contention. The scheduling of the respondent's claim under s. 352,

with reference to Mata Ghulam's decree, had not the effect of superseding that decree or of creating another decretal right in addition to it or independent of it, and therefore there does not, out of this circumstance alone, arise any impediment to the maintenance of the present action, which, as we said above, is brought under s. 283 of the Code to establish against persons who are strangers to the decree of the 12th May, 1886 the right which the respondent claims to have in the carriage which was the subject of that decree, but has now passed into the possession and control of strangers to that decree.

It seems to us that the present action is founded upon a new and different cause of action, and being brought against persons who are no parties to Mata Ghulam's decree, there can be no question of the competence of the respondents to maintain his present action. The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

THAKRO AND OTHERS (DEFENDANTS) v. GANGA PRASAD, (PLAINTIFF).

[On appeal from the High Court for the North-Western Provinces.]

Shares in village held by wife of former proprietor—Stridhan.—Mitakshara—Mutation of names in the settlement record.

A share in a pattidari village given by a Hindu proprietor to his wife may become her stridhan, within the contemplation of the Mitakshara, section 11, cl. 1, enabling her to make a valid gift of it.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidenced by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct.

Appeal from a decree (23rd January, 1883) of the High Court, reversing a decree (15th July, 1880) of the Subordinate Judge of Aligarh.

The question on this appeal was whether a widow, whose deceased husband had been in his lifetime a lambardar and pat-

Present: LORD FITZGERALD, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COCHRAN.

1888

ABDUL
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P. C.

J. C.

1887

December
13th and 14th