

occurred as therein mentioned. It requires more than this, especially where, as in the present case, the surrounding circumstances were suspicious and not explained.

We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

SETH SHAPURJI NANA BHAI (DECREE-HOLDER) v. SHANKAR DAT DUBE
(OBJECTOR).*

Execution of decree—Civil Procedure Code, s. 234—Application to execute decree against alleged representative of deceased judgment-debtor.

In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against a person alleged to be the representative of a deceased judgment-debtor it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. *Srihary Mundul v. Murari Chowdhry* (1).

THE facts of this case sufficiently appear from the judgment of Aikman J.

Munshi *Ram Prasad* and Maulvi *Ghulam Mujtaba* for the appellant.

Pandit *Sundar Lal* and Babu *Kalindi Prasad* for the respondent.

AIKMAN, J.—The appellant in this case got a money decree from the Court of the Subordinate Judge of Aligarh against one Rája Hari Har Dat Dube, a resident of the district of Jaunpur. The judgment-debtor died after the passing of the decree and before execution had been taken out. After his death the decree-holder applied to the Court which passed the decree to send it for execution to the Court of the Subordinate Judge of Jaunpur. In his application he inserted the name of the respondent Raja Shankar Dat Dube, brother, and Musammat Sahodra, widow, of the deceased judgment-

* Second Appeal No. 694 of 1894, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th April 1894, confirming an order of Babu Mohan Lal, Subordinate Judge of Aligarh, dated the 23rd July 1892.

(1) I. L. R., 13 Calc., 257.

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debtor as his legal representatives. Notice was issued to these two persons to show cause why the decree should not be executed against them. No cause was shown by Musammat Sahodra, but Raja Shankar Dat Dube presented a petition of objection, contending that he was not the heir of the deceased judgment-debtor and that no property of the deceased had come to his hands. The Subordinate Judge of Aligarh found both these issues against him and ordered the transfer of the decree for execution to Jaunpur. Against this order Raja Shankar Dat Dube appealed to the District Judge of Aligarh, repeating in his appeal the same objections as he had raised before the Subordinate Judge. Neither before the Subordinate Judge nor in his appeal to the District Judge did he raise any question as to the jurisdiction of the former Court to decide as to whether or not he was the legal representative of the deceased judgment-debtor. The learned District Judge allowed the appeal, being of opinion that the decision of the Subordinate Judge as to whether the applicant was or was not the heir of the deceased judgment-debtor was *ultra vires*, inasmuch as the question was one to be decided by the Court executing the decree. In second appeal to this Court the decree-holder impugns the correctness of the learned Judge's opinion. I think the appeal must succeed. Although the decree-holder did not refer in his petition to s. 234 of the Code, I think his application amounts to an application under the first paragraph of that section, and from the wording of that section it is in my opinion a question for the Court which passed the decree to decide whether a particular person is or is not the legal representative of a deceased judgment-debtor. But I think the Subordinate Judge was exceeding his powers when he went on to decide as to the amount of property which had come to the hands of the respondent. The Court which passed the decree having decided who is to be regarded as the legal representative, it is for the Court executing the decree to decide as to the extent of that legal representative's liability. I draw this inference from the use of the words "the Court which passed the decree" in the first paragraph, and "the Court executing the decree" in the second paragraph of s. 234 of the Code. So much

therefore of the Subordinate Judge's decision as referred to the property in the hands of the respondent was *ultra vires*, but in my opinion the Subordinate Judge had jurisdiction to decide as to whether or not the respondent was the legal representative. This was a question properly for the Court which passed the decree, and not for the Court to which the decree was transferred. The learned counsel for the respondent relies on s. 244 cl. (c). This gives the Court executing a decree jurisdiction to determine "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 or to the stay of execution thereof." But this does not give a Court executing a decree transferred to it jurisdiction to determine who are to be considered the representatives. Any order passed by a Court sending a decree for execution to another Court holding that the decree might be executed against a certain person as the legal representative of the deceased judgment-debtor might, I think, come within the provision of cl. (c) of s. 244 of the Code of Civil Procedure, and a copy of it should be sent to the Court to which the decree is transferred for execution. In this view I am supported by the remarks of Prinsep and Beverley, J.J., in *Srihary Mundul v. Murari Chowdhry* (1). The learned District Judge in his judgment says as follows:—"I agree with the Subordinate Judge that the application of the original applicant (now appellant) should have been dismissed, but the application should have been dismissed on the ground that the Court had no jurisdiction to entertain the application." The meaning of this is not quite clear, but I gather from it that the District Judge merely held that the lower Court ought to have dismissed the application as having no jurisdiction, and did not mean to hold that the application should have been dismissed on its merits. I therefore think that the case must be remanded under s. 562 of the Code of Civil Procedure. I allow this appeal, and, setting aside the order of the lower appellate Court, remand the case under s. 562 of the Code of Civil Procedure with directions to re-admit the appeal under its original

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(1) I. L. R., 13 Cal., 257, at p. 262.

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number on the register and proceed to determine it on the merits with reference to the above remarks. The costs will abide the result.

Appeal decreed ; cause remanded.

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March 8.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

BHIKHARI DAS AND ANOTHER (PLAINTIFFS) v. DALIP SINGH AND OTHERS
(DEFENDANTS).*

Mortgage—Sale by mortgagor of part of the mortgaged property—Such sale not to affect the rights of the mortgagee under his mortgage—Act No. IV of 1882, (Transfer of Property Act) s. 88.

The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor subsequently to the mortgage selling a portion of the mortgaged property to a third person. *Lala Dilawar Sahai v. Dewan Bolakiram (1), Indukuri Rama Raju v. Yerramilli Subbarayudu (2) and Banwari Das v. Muhammad Mashiat (3)* referred to.

THIS was a suit for sale upon a mortgage of shares in various villages, including a share in a village known as "Fatehpur Shamshoi." The plaintiffs claimed as owners of the bond sued upon by virtue of a partition of the property of the joint family of which they and the original mortgagor had been members. The defendants were the widow and sons of the mortgagor, the original mortgagee, *pro forma*, a person whose name was alleged in the plaint to have been fictitiously entered in the Revenue papers in respect of a portion of the mortgaged property, and one Ram Kishen Das, who had purchased subsequently to the mortgage the mortgaged share in Fatehpur Shamshoi.

The representatives of the original mortgagor put in various defences which it is not necessary here to set forth. Ram Kishen Das pleaded that he had purchased the share in Fatehpur Shamshoi in good faith and for valuable consideration, and that under s. 56 of Act No. IV of 1882, the mortgagees should proceed first against the other properties included in the mortgage-deed in suit.

* First Appeal No. 253 of 1893 from a decree of Bai Banwari Lal, Subordinate Judge of Sháhjahánpur, dated the 30th August 1893.

(1) I. L. R., 11 Calo, 258.

(2) I. L. R., 5 Mad., 387.

(3) I. L. R., 9 All., 690.