

1897
May 11.

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

SANWAL DAS (DEFENDANT) v. BISMILLAH BEGAM (PLAINTIFF).*

Civil Procedure Code sections 244, 278—Execution of decree—Decree for sale on a mortgage—Mode of intervention of third party claiming an interest by succession in the property decreed to be sold.

Two heirs of a Muhammadan woman took possession on her death of certain immovable property left by her to the exclusion of the third heir, their sister. They mortgaged that property. The mortgagee brought a suit and obtained a decree for sale. After decree one of the mortgagors died and his sister was brought upon the record as his representative. The property was sold, and subsequently the sister brought a suit against the auction purchaser for recovery of her share in the mortgaged property. *Held* that section 244 of the Code of Civil Procedure did not apply and that the suit was maintainable. *Deefholts v. Peters* (1) and *Seth Chand Mal v. Durga Dei* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

EDGE, C. J. and BLAIR, J.—One Badshah Begam had three children—Ikram Husain, Farhat Husain, and Bismillah Begam. Ikram Husain and Farhat Husain after Badshah Begam's death mortgaged a village which had belonged to Badshah Begam in her life-time, and which, unless something in the way of limitation happened, belonged to Ikram Husain, Farhat Husain and Bismillah Begam as heirs of Badshah Begam. The mortgagee brought a suit for sale under section 88 of the Transfer of Property Act against Ikram Husain and Farhat Husain, and got a decree directing that, in the event of the amount decreed not being paid, the village which had belonged to Badshah Begam should be sold. Farhat Husain died before the decree was executed, and thereupon his sister, Bismillah Begam, was brought into the proceedings as his representative. The village was sold, and Bismillah Begam brought this suit to obtain her one-fifth share of this village. The first Court dismissed the suit on the ground that section 244 of the Code of Civil Procedure applied.

* First Appeal from Order No. 3 of 1897 from an order of W. F. Wells, Esq., District Judge of Agra, dated the 18th December 1896.

(1) I. L. R., 14 Cal. 551.

(2) I. L. R., 12 All. 313.

The second Court, holding that section 244 did not apply, set aside the decree of the first Court and made an order of remand under section 562 of the Code. From that order of remand this appeal has been brought.

It has been contended by Mr. *Ram Prasad* that *Bismillah Begam's* remedy was an objection to the sale under section 244 of the Code of Civil Procedure. The Calcutta High Court has held in *Deefholts v. Peters* (1) that section 278 of the Code of Civil Procedure does not apply in execution of decrees for sale. Mr. *Ram Prasad* has relied on the judgment of this Court in *Seth Chand Mal v. Durga Dei* (2). We may say that, although we agree entirely with the judgment in that case, it cannot be applied here. If there is one point on which we believe there is general concurrence of opinion in the High Courts of India, it is that a Court executing a decree cannot take upon itself to alter or vary that decree. Its powers are confined to construing a decree when necessary and executing a decree in its terms so long as the law allows the decree to be executed. There is an essential difference between the execution of a decree for money by the sale of the property and the execution of a decree for sale of property specified in the decree. In the first case any third person can intervene in the execution of a decree and show that the decree could not be executed against particular property, if that property was not the property of the judgment-debtor, but was the property of the person opposing. Similarly in the case of a decree for money, where the judgment-debtor dies, his representative is entitled to oppose the execution of the decree against any particular property by showing that property was not the property of the judgment-debtor and was the property of the representative, as for example, that it was his self-acquired property. That course can be taken by a stranger or a representative in execution of a decree for money for this reason, that a decree for money is not based upon any adjudication that the particular property, or in fact any property, which may subsequently be brought to sale in execution of the

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(1) I. L. R., 14 Cal., 631.

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decree, was the property of the judgment-debtor, or property which would be liable to his debts. Consequently, when such objection is taken before the Court executing a decree for money, that Court has power to inquire into and decide on any such objection taken to the execution of the decree against any particular property. Where, however, the decree is a decree for sale under the Transfer of Property Act, the Court executing the decree must sell the property decreed to be sold and leave any one objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser. For these reasons we are of opinion that the Court of first appeal was right and that section 244 of the Code of Civil Procedure did not bar this suit.

We dismiss this appeal and affirm the decision of the Court.

Appeal dismissed.

Before Mr. Justice Know and Mr. Justice Burditt.

THE BANK OF UPPER INDIA (PLAINTIFF) v. SHEO PRASAD AND OTHERS (DEFENDANTS).*

Execution of decree—Civil Procedure Code section 276—Attachment—Effect upon maintenance of attachment of order dismissing application for execution.

Where property has once been attached in execution of a decree, an order merely dismissing an application for execution, which order does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. *Gunga Rai v. Mussumat Sakeena Begum* (1); *Nadir Hossein v. Pearoo Thovildarinee* (2); and *Golan Yahya v. Sham Soondree Kooree* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *J. E. Howard* and *E. A. Howard*, for the appellant.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the respondents.

* First Appeal No. 213 of 1895 from a decree of Saiyid Zain-ul-Abdin, Subordinate Judge of Cawnpore, dated the 5th September 1895.

(1) N.-W. P. H. C. Rep. 1873, p. 72.

(2) 14 B. L. R. 425.

(3) 12 W. R. 142.