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These circumstances show that the defendants themselves understood the bequest made by Moti Ram in favour of Sohni to be that of a widow's estate. There can be no doubt that the defendants have not a better title to the property than the plaintiffs. But that fact alone would not certainly entitle the plaintiffs to a decree, if the possession of Sohni was under an adverse proprietary title. Having regard to the terms in which Moti Ram bestowed the property on her, to the inference to be drawn as to his intention from the general understanding among Hindus as to the nature of a woman's estate and to the fact that she herself and the defendants, or their predecessors in title, regarded her estate as that of a Hindu widow with limited right, we are of opinion that the Court below has rightly held that the plaintiffs were equally entitled with the defendants to succeed to Moti Ram's estate on the death of Mussammat Sohni. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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July 15.

Before Mr. Justice Knox, Mr. Justice Blair and Mr. Justice Aikman.

TAPESRI LAL AND OTHERS (DEFENDANTS) *v.* DEOKI NANDAN RAI AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 293—*Execution of decree—Sale in execution—Order for recovery of deficiency of re-sale—Suit to set aside order—Certificate of amount of deficiency.*

Held that a suit will lie to set aside an order passed under section 293 of the Code of Civil Procedure.

Held also that the fact that the certificate provided for by section 293 of the Code has not been granted will not prevent the decree-holder or the judgment-debtor, as the case may be, from recovering from the defaulter the deficiency arising on a re-sale of property sold in execution of a decree but not paid for.

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

Munshi *Jwala Prasad* for the appellants.

Mr. *T. Conlan* for the respondent.

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* Second Appeal No. 117 of 1894, from a decree of Maulvi Muhammad Ismail, Additional Subordinate Judge of Ghâzipur, dated the 21st November 1893, modifying a decree of Babu Sheocharan Lal, Munsif of Rasra, dated the 31st July 1893.

KNOX, BLAIR AND AIKMAN, JJ.—The parties to this second appeal are Babu Deokinandan Rai, and Sheobalak Rai, who have been compelled by an order made under section 293 of the Code of Civil Procedure, to pay the deficiency of price which happened on a re-sale of property purchased by them and not paid for, and Tapesri Lal and others, the judgment-creditors, who by virtue of that order recovered from Babu Deokinandan Rai and Sheobalak Rai the aforesaid deficiency of price and the expenses on the re-sale. Babu Deokinandan Rai and Sheobalak Rai claimed in the suit out of which this appeal arises to recover the amount paid by them upon the ground that the judgment-creditor recovered the money without any certificate furnished by the officer holding the sale, a preliminary which they contend was absolutely necessary before the amount could be recovered. Both the Courts below have held that the absence of the certificate mentioned in section 293 of the Code of the Civil Procedure is a fatal defect. The order of the Court passed without this preliminary certificate is according to them illegal and without jurisdiction. They accordingly decreed the suit brought by the respondents.

In appeal before us the contention is that the suit of the respondents is barred by article 13 of schedule II of the Indian Limitation Act, 1877, and further that the appellant is not prejudiced by the neglect or omission, if any, of the officer holding the sale to certify to the Court the deficiency of price and the expenses attendant on the re-sale.

In our opinion the plea that the suit was barred by limitation entirely fails. It is true that the order passed by the Court under whose directions the sale was held is dated the 2nd of March 1889. But an appeal was lodged from that order, and the date of the final decision in the case by a Court competent to determine it finally was the 10th of March 1892. The respondents are entitled to have this period excluded in computing the period of limitation, and if it be so excluded, the present suit, which was instituted on the 9th of March

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1893, was within one year from the 10th of March 1892, and consequently within time.

In arguing the second plea the learned vakíl who appeared for the appellants divided his arguments into two heads: the first being that a suit to set aside an order passed under section 293 was not maintainable; and the second that the certificate mentioned in section 293 was not so essential that its absence would prevent a judgment-creditor or a judgment-debtor, as the case might be, recovering from the defaulter. His argument was that the order in question had been passed by a competent Court; it was intended by the Legislature, who have made no provision for appeal, to be a final order. He drew our attention to section 283, and contended that the absence of any similar section relating to orders passed under section 293 was strong ground for the conclusion that the Legislature did not intend that a suit should be brought to set aside such orders. But there is a vast difference between orders passed under sections 280, 281, or 282 and orders passed under section 293. The former class of orders are judicial or quasi judicial orders. They are not to be passed except after an investigation made and opportunity given to the parties interested to adduce evidence. No such provision is made with regard to orders passed under section 293. Section 293 contemplates that the officer holding the sale shall simply go through the arithmetical process of calculating accurately what deficiency of price has taken place and what the expenses attending the re-sale were. To no one interested is any opportunity given of being present at or of questioning the arithmetical process aforesaid. The officer draws up his certificate and upon that certificate the Court also proceeds, at the instance of the parties authorized to set it in motion, to recover the amount certified, just as if the certificate were a decree and the Court were the Court executing a decree. Any order passed by a Court under such circumstances is in effect an administrative and not a judicial order. We know of no precedent or authority standing in the way of such orders being questioned by a separate suit. There being no enactment in

bar, the suit was in our opinion one which the Court had jurisdiction to try, and the argument that the suit was not maintainable has no force.

As regards the question whether a certificate by the officer holding the sale is so essential a preliminary that without it a Civil Court cannot at the instance of the judgment-creditor or judgment-debtor, order a recovery from the defaulter, we were referred to no authority or precedent on the point. The learned counsel for the respondents took his stand upon the language used in section 293. He pointed out to us that the provision requiring a certificate did not exist in Act No. VIII of 1859. Its insertion in the present code must have been, so he argued, of set purpose. A careful consideration of section 293 satisfies us that we should not be warranted in drawing the conclusion he asked us to draw from the language contained in it. Two things are provided for by that section. The first is that the deficiency of price and expenses attending the re-sale shall be entered in a certificate to be drawn up by the officer holding the sale. The second is that the deficiency in those expenses shall be recoverable from the defaulter in the manner set out. But each provision is independent of the other, and there is no word or expression compelling us to hold that the first is a condition precedent to the second. It is easy to see that if it were a condition precedent cases of very great hardship and injustice might ensue. The officer holding the re-sale might die before he had granted the certificate, or he might be prevented in other ways from making such a certificate. His incapacity to grant the certificate might be due to no fault of the judgment-creditor or the judgment-debtor. To debar these persons from recovering money to which they are entitled both in law and equity merely because of such an incapacity would amount to a miscarriage of justice. We prefer to put upon the section an interpretation which it can bear and which will not result in such hardships. The result, therefore, is that this appeal will prevail. The appeal will be decreed. The judgment and decree of the lower appellate Court will be set aside and the case

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remanded to the lower appellate Court with instructions to re-admit it upon its original file of pending appeals and to dispose of it according to law. Costs will abide the event.

Appeal decreed and cause remanded.

FULL BENCH.

1896
July 16.

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

LACHMAN DAS (PLAINTIFF) *v* KHUNNU LAL AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Liability of grandsons to pay interest on their grandfather's debts—Mortgage.

The mortgagee from a Hindu of the joint ancestral property of the latter can enforce his mortgage against the grandson of the mortgagor for the realization of the interest secured by the mortgage in addition to the principal amount of the mortgage. *Narasimharav Krishnarav* v. *Antaji Virupaksh* (1), *Nanomi Babuasin* v. *Modhun Mohun* (2), *Hanooman Persaud Panday* v. *Mussamat Babooee Munraj Koonweree* (3) and *Girdharee Lall* v. *Kunto Lall* (4) referred to.

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

Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri* for the appellant.

Mr. *D. N. Banerji* for the respondents.

The Judgment of EDGE, C. J., BLAIR, BANERJI and AIKMAN, JJ., was delivered by BANERJI, J.—

This appeal has arisen in a suit brought by the appellant under section 88 of Act No. IV of 1882 for sale under two mortgages dated, respectively, the 25th of October 1881 and the 1st of November 1881, executed by one Murlidhar, now deceased. The defendants are the grandsons of Murlidhar, being the sons of his deceased son Ajudhia Prasad.

There is no dispute in this appeal in regard to the mortgage bond dated the 1st of November 1881. It is the other bond with

* First Appeal No. 139 of 1894, from a decree of Maulvi Ahmad Ali, Subordinate Judge of Aligarh, dated the 13th April 1894.

(1) 2 Bom. H. C. Rep., 64.
(2) I. L. R., 13 Calc., 21.
(3) 6 Moo. I. A., 393.
(4) L. R., 1 I. A., 321.