

was done, a payment of the Rs. 17,000 would leave the property still incumbered, as Srikishen would only receive it, if he did so, in part payment of what was due. From the nature of the transaction it was not a deposit upon which the vendees would be liable to pay interest unless they refused or omitted to pay the money when they were informed by the vendor that he was prepared to pay the balance necessary to satisfy what was due to Srikishen. Without that balance they were not bound to pay or tender to him the Rs. 17,000. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the Appellants: *Messrs. Barrow and Rogers.*

Solicitors for the Respondents: *Messrs. Ranken Ford, Ford, and Chester.*

1898

MUHAMMAD
SUDDIQ
KHAN
v.
MUHAMMAD
NASIR
ULLAH
KHAN.

APPELLATE CIVIL.

1899

February 7.

Before Mr. Justice Knox and Mr. Justice Banerji.

SHEORAJ SINGH (JUDGMENT-DEBTOR) v. GAURI SAHAI AND OTHERS
(DECREE-HOLDERS).*

Civil Procedure Code, sections 344 et seqq—Insolvency—Holder of decree on mortgage not entered amongst the scheduled creditors—Decree-holder not debarred from executing his decree.

Held that a judgment-creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceedings, lose his right to execute his decree. *Haro Pria Dabia v. Shama Charan Sen* (1) and *Shridhar Narayan v. Atmaram Govind* (2) referred to.

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

Pandit *Sundar Lal* and Pandit *Baldeo Ram*, for the appellant.

* First Appeal No. 278 of 1897, from a decree of Pandit Raj Nath Sahab, Subordinate Judge of Moradabad, dated the 20th September 1897.

(1) (1889) I. L. R., 16 Calc., 592.

(2) (1883) I. L. R., 7 Bom., 455.

1898

SHEORAJ
SINGH
v.
GAURI
SAHAI.

Munshi *Ram Prasad* and Munshi *Gokul Prasad*, for the respondents.

KNOX and BANERJI, JJ.—Raja Sheoraj Singh, the appellant before us, is a judgment-debtor of the respondents. The respondents hold a decree against him, dated the 5th March 1885, for sale under a mortgage deed. Before the decree had been passed Raja Sheoraj Singh had applied, under the provisions of Chapter XX of the Code of Civil Procedure, to be declared an insolvent. With his application he filed a list of his creditors. The list was subsequently amended by him, and in the amended list under the head No. 8 Har Sahai, father of the respondent, was entered as a creditor holding a decree dated the 5th March 1885, arising out of a mortgage bond in favour of Har Sahai, which bore date the 5th March 1879. The judgment-debtor was eventually declared an insolvent by the order of this Court dated the 16th July 1886. Upon this the creditors mentioned in the application were called upon to produce evidence as to the amount and particulars of their respective pecuniary claims, and the record prepared at the time shows that Har Sahai did not put in an appearance. The entry says that he was said to be dead. The amount proved was declared to be *nil*. A receiver was appointed in due course, who made collections, paid the scheduled creditors in full, and found himself with a balance in hand of Rs. 8,324-7-11. After all this had taken place the present respondents made an application to the Collector, to whom the decree had been transferred for execution by reason of the property concerned being ancestral property, for attachment, and in due course of time we find that the District Judge paid over the balance to the respondents. They took it, and afterwards asked that the property now in dispute might be brought to sale for the recovery of the balance due from the appellant to the respondents. The property in question is the same property which had been mortgaged in the bond of 1879, and which the receiver had handed over for restoration to the judgment-debtor. Upon the application for sale the appellant raised several objections. Among them was the objection now before

1898

 SHUBRAJ
 SINGH
 v.
 GAURI
 SAKAL.

us; but, with the exception of a question bearing on the question of interest, the application for execution was allowed to proceed and the property declared liable for sale. From this order arises the present appeal. It is contended before us that as the decreeholders had, under section 356 of the Code of Civil Procedure, received their distributive share of the assets of the appellant in the hands of the receiver they cannot now execute the decree for the balance of the decretal amount; further, that by virtue of the proceedings taken under sections 351, 356 and 357, the decree is incapable of execution. It was said that the moment the judgment-debtor was declared insolvent, all creditors were bound to come and prove their debts; that the schedule prepared under section 352 operated as a decree, and that any creditor who did not come in within the period of limitation allowed by article 174 of the second schedule of the Indian Limitation Act and prove his debt or, when the schedule was in error, did not get the schedule amended, lost any further rights or remedies in respect of his debt. In the present case the respondents had made no attempt either to prove their debt when the schedule was prepared, or to get the schedule amended after it had been prepared, and hence it was urged that they were not entitled to execute the decree they hold. We are unable to agree with this contention. We can find nothing in section 353 or in any other part of Chapter XX of the Code which declares that where a creditor has not proved his claim or got an entry in the schedule amended he has debarred himself of all rights to execute a decree which he holds, especially when that decree is subsisting and is based upon a mortgage debt. Section 357, which lays down in effect the consequence of the discharge of the judgment-debtor under the Code, refers only to scheduled debts. More than this, scheduled creditors are expressly declared to be still empowered to proceed against property other than that vested in the receiver under certain restrictions, whether that property was previously or subsequently acquired. In the case of *Haro Pria Dabia v. Shama Charan Sen* (1) it

1898

SHEORAJ
SINGH
v.
GAURI
SAHAI.

has been pointed out "that where a person has got a right and it is contended that that right is taken away by statute, the right cannot be held to have been taken away except by express words in the statute, or by inference so clear from the terms of the enactment that there can be no doubt about it." The principle of that case is on all fours with the case before us. Our view is supported by the case of *Shridhar Narayan v. Atmaram Govind* (1). We dismiss the appeal with costs.

Appeal dismissed.

1899

February 9.

Before Mr. Justice Blair and Mr. Justice Burkitt.

SITA RAM (PLAINTIFF) v. NAUNI DULAIYA (DEFENDANT).*

Civil Procedure Code, sections 25, 562—Transfer—Procedure—Suit transferred to his own file by District Judge—Appeal to High Court—Remand to District Judge—Judge not competent to transfer.

By order of a District Judge under section 25 of the Code of Civil Procedure a suit was transferred from the Court of the Subordinate Judge to his own Court. The District Judge decided the suit, and from his decree there was an appeal to the High Court. The High Court remanded the suit under section 562 of the Code to the Court of the District Judge. The latter transferred the suit so remanded for trial to the Subordinate Judge. *Held* that the District Judge had then no power to transfer the suit, but was bound to try it himself.

Seemle that section 25 of the Code of Civil Procedure has no application to a case remanded under section 562 of the Code.

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

Babu *Jogindro Nath Charudhri* and Babu *Ratan Chund*, for the appellant.

Munshi *Gulzari Lal* (for whom Babu *Satish Chandar Banerji*), for the respondent.

BLAIR and BURKITT, JJ.—The suit in which this second appeal has been instituted was transferred under the provisions

* Second Appeal No. 830 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 3rd June 1896, reversing a decree of A. Rahman, Esq., Subordinate Judge of Jhansi, dated the 26th February 1896.