

in which the shares of both are included. The idea of subordination to which Mr. Justice Aikman refers appears to have been derived, so far as I can ascertain, from the primary idea of inclusion, as where a sub-tenant is called a *shikmi* apparently because his interest is included in, and forms part of, a tenancy from which it was created. I agree in making the order proposed by my brother Banerji.

1901

ABDUL
SHAKUR
v.
MENDAL.

Appeal decreed.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

DALLU MAL AND ANOTHER (DEFPDANTS) v. HARI DAS (PLAINTIFF).*

1901
March 13.

Execution of decree—Civil Procedure Code, section 283—Decree against one only of several co-heirs of deceased debtor—Transfer by judgment-debtor of property belonging to himself and co-heirs—Plea of jus tertii raised by transferees.

The plaintiff obtained a money decree for a debt due by a deceased Muhammadan against one only of several heirs of the deceased. In execution of this decree an attachment was made of certain immovable property formerly of the original debtor; but prior to such attachment the judgment-debtor had by an oral agreement transferred such property to other persons and put them in possession.

Held, that it was open to the transferees in possession to raise the defence which their transferor could have raised, namely, that only the rights and interests of the judgment-debtor himself were liable to attachment and sale in execution of the decree, and not the rights and interests of the co-heirs of the judgment-debtor. *Jafri Begam v. Amir Muhammad Khan* (1), *Nathmal Das v. Tajammul Husain* (2) and *Seth Chand Mal v. Durga Devi* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandra Mukerji* for the appellants.

Pandit *Sundur Lal*, Munshi *Jang Bahadur Lal* and Munshi *Gokul Prasad*, for the respondent.

STRACHEY, C.J.—This is a suit under section 283 of the Code of Civil Procedure to establish the right of the plaintiff to attach and bring to sale certain immovable property in

* Second Appeal No. 649 of 1898 from a decree of R. Greeven, Esq., District Judge of Benares, dated the 10th October 1898, modifying the decree of Babu Mohan Lal, Subordinate Judge of Benares, dated the 18th May 1898.

(1) (1885) I. L. R., 7 All., 822.

(2) (1884) I. L. R., 7 All., 36.

(3) (1889) I. L. R. 12 All., 313.

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execution of a decree held by him. The decree was a money decree for a debt due to the plaintiff by the ex-Nawab of Tonk. It was obtained against one Abdul Wahab, who was one of the heirs of the debtor, and was in possession of the deceased's estate. The decree was against Abdul Wahab alone as representative of the deceased debtor. There were other heirs of the deceased entitled under the Muhammadan law to share in the estate. They were not parties to the suit or decree. The plaintiff now seeks to execute the decree against certain immovable property formerly of the debtor, which, prior to the attachment, was made over by the judgment-debtor Abdul Wahab, not by any registered instrument, but by means of an oral transfer to the defendants in this case. It is found that at the time of that transfer, Abdul Wahab was in possession of the property. It is also found upon remand that at the date of the attachment in execution of the plaintiff's decree the present defendants were in possession derived from Abdul Wahab. The plaintiff seeks to execute his decree against all the deceased's rights and interests in the property in the defendants' hands, and not merely the rights and interests in the property of the judgment-debtor, Abdul Wahab. The lower appellate Court has decreed the claim upon the authority of *Muttyjan v. Ahmed Ally* (1). The decision in that case was dissented from by a Full Bench of this Court in *Jafri Begam v. Amir Muhammad Khan* (2). In this Court it is settled that a decree passed against only the heir or heirs in possession of the estate of a deceased Muhammadan debtor does not bind the other heirs who are not parties to the suit so as to enable their rights and interests to be sold in execution, and that they may, subject to certain conditions, recover their shares from the auction purchaser. Having regard to the decision of the Full Bench, it was not contended on behalf of the plaintiff that under the decree he was strictly entitled to sell more than the rights and interests in the property of the judgment-debtor, Abdul Wahab. The main question discussed was whether the defendants, who claim under Abdul Wahab by a transaction prior to the attachment, can resist the suit upon such a ground. It was contended that they could not, as they stood in no better position than Abdul Wahab.

(1) (1882) I. L., 8 Calc., 370.

(2) (1885) I. L. R., 7 All., 822.

and that he could not have resisted the attachment and sale of the whole property upon such a ground. I do not think that contention is correct. If the execution of the decree had been sought against this property in the hands of Abdul Wahab, I see no reason why he should not have objected to the attachment and sale of the rights and interests of the other heirs who were not parties to the suit, upon the ground that, as regards those other heirs and their interests, he was in possession of the property as trustee. That a judgment-debtor could make such an objection is shown by the case of *Nathmal Das v. Tajammul Husain* (1), and is recognised by the Full Bench in the case of *Seth Chand Mal v. Durga Dei* (2). I think that the judgment-debtor could certainly have asked that execution of the decree should be limited to his own rights and interests in accordance with the decision of the Full Bench in the case of *Jafri Begam v. Amir Muhammad Khan*. The defendants, in my opinion, can do the same. They rely on their possession and they dispute the plaintiff's right to disturb their possession, except in so far as he can establish a superior title. So far as the interest in the property of Abdul Wahab is concerned the plaintiff's superior title is established. So far as the rights and interests of the other heirs are concerned, it may be that Abdul Wahab had no right to put the defendants into possession: but so far as regards those rights and interests, the plaintiff is no more entitled under his decree to bring them to sale than the defendants are to retain possession. That being so, I think that this appeal ought to be allowed, the decree of the lower appellate Court set aside, and the decree of the Court of first instance restored with costs.

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BANERJI, J.—I concur. The main contention on behalf of the respondent was, that the defendant could not set up a plea which Abdul Wahab, through whom they derived their title, could not have set up. For the reasons stated by the learned Chief Justice, I am of opinion that that contention is unsound. It was open to Abdul Wahab to contend that the decree-holder plaintiff was not entitled to proceed against any property other than the interests of Abdul Wahab himself in the estate of the deceased debtor. He could have urged that as regards the shares of his

(1) (1884) I. L. R., 7 All., 36.

(2) (1889) I. L. R., 12 All., 313.

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brothers and the other heirs of the deceased, he was in the position of a trustee. That being so, the defendants were entitled to set up the *ius tertii* of the heirs of the deceased debtor other than Abdul Wahab, and under the decree which the plaintiff got he could proceed against the interests of Abdul Wahab alone in the estate of the deceased. I also would therefore restore the decree of the Court of first instance.

Appeal decreed.

APPELLATE CRIMINAL.

1901

March 14.

Before Mr. Justice Blair and Mr. Justice Aikman.

KING-EMPEROR v. JOHRI.*

Act No. XLV of 1860 (Indian Penal Code), sections 224, 411—Escapes from lawful custody—Actual thief arrested by private person whilst in possession of stolen property—Section 411 of the Indian Penal Code not applicable to the thief himself.

Section 411 of the Indian Penal Code does not apply to the person who is the actual thief. Where, therefore, a person whose bullock had been stolen in his absence traced it to the house of the thief, and there and then arrested him, and made him over to a chaukidar, from whose custody he escaped, it was held that this was not an escape from lawful custody within the meaning of section 224 of the Code.

Seemle that if the owner of the bullock had himself been entitled to make the arrest, the subsequent custody of the prisoner by the chaukidar would have been a lawful custody. *Queen-Empress v. Potadu* (1) referred to.

THE facts of this case sufficiently appear from either of the judgments.

The Government Advocate (Mr. E. Chamier), in support of the appeal.

BLAIR, J.—This is an appeal from an order of acquittal by a Magistrate under the following circumstances. One Johri had been convicted of stealing a bullock, the property of one Mata Bhikh. Mata Bhikh lost his bullock, apparently got wind of Johri, followed him into his house, and there found him in possession of the stolen bullock. Mata Bhikh then arrested him and made him over to the police chaukidar, from whose custody he shortly afterwards escaped. Johri was tried for and convicted

*Criminal Appeal No. 93 of 1901.

(1) (1888) L. L. R., 11 Mad., 480.