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passed by right of survivorship. But as the defendants mentioned above did not take any steps to enforce their decrees during Harihar Dat's life-time, they could not proceed against the property in the hands of the surviving member. It was, however, contended by Mr. *Malaviya* that in this case a severance of the joint family had taken place by reason of the attachment placed on Harihar Dat's interest in the joint family property, and the exemption from attachment of the interest of his brother Shankar Dat. That argument is based upon an erroneous view of the law, and is certainly contrary to what the Privy Council laid down in the case of *Deendyal Lal v. Jugdeep Narain Singh*. In that case their Lordships held that, although the undivided interest of a member of a joint Hindu family could be sold by auction, such sale would not interfere with the status of the family until partition was effected at the instance of the auction-purchaser. For the above reasons I agree in holding that the plaintiffs were entitled to be paid out of the assets realized by the sale of Harihar Dat's property in preference to such of the defendants as had not taken out attachments on the interests of Harihar Dat during his life-time.

Appeal dismissed.

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November 27.

Before Mr. Justice Blair and Mr. Justice Aikman.

KISHEN LAL (PLAINTIFF) v. CHARAT SINGH AND OTHERS
(DEFENDANTS).*

Civil Procedure Code, section 276—Mortgage alleged to have been made pending an attachment—Attachment when to be considered as raised—Execution of decree.

Where a party prosecuting a decree is compelled to take out another execution, his title should be presumed to date from the second attachment. *Puddomonee Dossee v. Mathoora Nath Chowdhry* (1) and *Hafiz Suleman v. Sheikh Abdullah* (2) referred to.

THE suit out of which this appeal arose was one for sale on a mortgage of the 27th March 1885. There were impleaded as defendants (1) some of the original mortgagors and representatives of others, and (2) the representatives of a certain person who

* Second Appeal No. 506 of 1898 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 12th April 1898, confirming a decree of Maulvi Muhammad Shafi, M.A., Munsif of Koil, District Aligarh, dated the 2nd August 1897.

(1) (1873) 12 B. L. R., 411.

(2) (1894) I. L. R., 16 All., 133.

had purchased one-half of the mortgaged property at a sale in execution of a simple money decree held by him. The defendants second party pleaded, *inter alia*, that section 276 of the Code of Civil Procedure was a bar to the plaintiff's claim, inasmuch as at the date of the execution of the mortgage in suit, the property was under attachment in execution of the decree held by their predecessor in title. The attachment relied on by the defendants second party was made in 1883. No sale took place thereunder, and the proceedings appear to have been dropped, though no evidence was placed upon the record to show precisely in what way they terminated. A fresh attachment was, however, taken out in 1887, and it was under this attachment that the property was sold.

The Court of first instance (Munsif of Koil) considered that section 276 of the Code of Civil Procedure applied to the facts as stated, and dismissed the suit. An appeal filed by the plaintiff was dismissed by the lower appellate Court (District Judge of Aligarh). The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *S. S. Singh* and Pandit *Moti Lal*, for the respondents.

BLAIR and AIKMAN, JJ.—This was a suit brought by one Kishen Lal for enforcement of a mortgage lien. It has been found by the Court below that the mortgage was void under the provisions of section 276 of the Code of Civil Procedure. The Court below finds that there was, at the date of the mortgage, a subsisting attachment. That finding we conceive to be erroneous. There had indeed been a prior attachment in 1883 in the execution proceedings. Proceedings in relation to that matter had been struck off some considerable time before the mortgage was made. Indeed the defendant's ancestor, under the money-decree in the suit in which the attachment had been made had gone far to confirm Kishen Lal's position by himself applying in 1887 for an attachment in execution of the same decree. If there was a subsisting attachment, such an application was wholly superfluous. If there was no attachment, the mortgage was a good mortgage. We have the Privy Council's authority in the case of *Puddomonee Dossee v. Muthoora Nath Chowdhry* (1) for the proposition

(1) (1879) 12 B. L. R., 411.

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that where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. There is no evidence to disturb that presumption. The ruling of the Privy Council has been acted upon by this Court in the case of *Hafiz Suleman v. Sheikh Abdullah* (1). The result is that the decree of the lower appellate Court will be set aside, and the case will be remanded under section 562 of the Code of Civil Procedure through the lower appellate Court to the Court of first instance for trial upon the merits. The appellant will have the costs already incurred by him in the lower appellate Court and the costs of this appeal. The remaining costs will abide the result.

Appeal decreed and cause remanded.

1900
November 28.

Before Mr. Justice Blair and Mr. Justice Aikman.

GOBARDHAN RAI (PLAINTIFF) v. BISHAN PRASAD AND OTHERS
(DEFENDANTS)*

Civil Procedure Code, sections 244, 305—Execution of decree—Representative of a party to the suit—Purchaser under a private sale sanctioned by the Court under section 305.

Held that a purchaser from a voluntary seller who has sold with the consent and authority of the Court under section 305 of the Code of Civil Procedure is a representative of the judgment-debtor within the meaning of section 244, clause (c).

THE facts of this case are as follows:—

On the 23rd March 1869 Radha Madhab Prasad and Radha Mohan Prasad and others executed a mortgage deed for Rs. 56,000 in favour of the Maharaja of Dumraon. The mortgagee instituted a suit on the 13th August 1885, and obtained a decree on the 24th December 1885. When this decree was put in execution the judgment-debtors, with the sanction of the Court under section 305 of the Code of Civil Procedure, sold the mortgaged property to Gobardhan Rai and others, and with the price thereof paid up the Maharaja's decree. Meanwhile, in 1885, after the suit of the Maharaja of Dumraon had been instituted, Radha Madhab Prasad executed a mortgage of the same property in

* Second Appeal No. 407 of 1900 from a decree of R. Greeven, Esq., District Judge of Ghazipur, dated the 13th March 1900, confirming a decree of Maulvi Syed Zainul Abidin, Subordinate Judge of Ghazipur, dated the 19th July 1898.

(1) (1894) I. L. R., 16 All., 13a.