

suit was brought by Ajúdhia Prasad, the brother of Ganga Dat, for a partition of his share in the property in question. The Court below has made a decree in his favour. It is contended on behalf of the appellants that the suit is not maintainable, inasmuch as it was one for partition of a part of the family property and did not embrace the whole of it. We think the contention has no force. As the appellants, the purchasers from Ganga Dat, are not interested in the remainder of the family property, they could not be made parties to a suit for a general partition of the family property, and the plaintiff was competent to sue for partition of that part of the family property in which the appellants, who are strangers to the family, are interested. This view is supported by the principle of the ruling of this Court in *Lachmi Narain v. Janki Das* (1) and by the ruling of the Madras High Court in *Subramanya Chettyar v. Padmanabha Chettyar* (2) which is a case on all fours with the present case. We accordingly dismiss the appeal with costs.

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Appeal dismissed.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
 Sir William Burdett.*

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 June 9.

KALI CHARAN AND OTHERS (PLAINTIFFS) v. JEWAT DUBE AND ANOTHER
 (DEFENDANTS).*

Civil Procedure Code, section 244—Execution of decree—Death of judgment-debtor pending execution proceedings—Questions arising between representatives of judgment-debtor and decree-holder.

Where a judgment-debtor dies after the passing of a decree and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which, under section 244 of the Code of Civil Procedure, must be determined in the execution department and not by separate suit. *Seth Chand Mal v. Durga Dei* (3) and *Panchanan Bundopadhyay v. Rabia Bibi* (4) followed.

* Second Appeal No. 813 of 1903, from a decree of W. Tudball, Esq., District Judge of Gorakhpur, dated the 8rd of June 1903, reversing a decree of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 12th of February 1903.

(1) (1901) I. L. R., 23 All., 216.
 (2) (1896) I. L. R., 19 Mad., 267.

(3) (1889) I. L. R., 12 All., 313.
 (4) (1890) I. L. R., 17 Calc., 711.

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One Ishar Dat on the 5th of July 1875 and the 8th of January 1876 mortgaged a 10 ganda 2 cowri 2 kant share in each of the villages Nandapur and Simroni to the predecessor in title of the defendants. A suit was brought to realize the amount due on the mortgage, and on the 17th of December 1886 a decree for sale of the hypothecated property was passed, but the person and other property of Ishar Dat were exempted from the operation of the decree. After three infructuous applications for sale in execution, ultimately, in August 1901, an application for sale was made. At the time the judgment-debtor was dead, and the present plaintiffs were brought upon the record of the execution proceedings as his representatives. By some error a 1 anna 12 ganda share was put up for sale and sold and purchased by the respondents on the 20th of May 1902. The plaintiffs took objection to the inclusion in the sale of any share in excess of 10 gandas odd, but their objection was disallowed. From the order passed on this objection an appeal was preferred by them, which was dismissed. The plaintiffs then brought the present suit, in which they sought that the sale should be set aside so far as it affected any property in excess of the share originally mortgaged. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the claim in part, but upon appeal the lower appellate Court (District Judge of Gorakhpur) reversed the first Court's decision and dismissed the suit. The plaintiffs appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The question raised in this appeal appear to us to be concluded by a decision of a Full Bench of this Court. The plaintiffs appellants are the sons of one Ishar Dat, who on the 5th of July 1875 and the 8th of January 1876, mortgaged a share of certain property in favour of the predecessor in title of the respondents. The share so mortgaged was 10 gandas odd. A suit was brought to realize the amount of the mortgage debts by sale of the mortgaged property, and on the 17th of December 1886 a decree for sale of the hypothecated property was passed, but the person and other property of Ishar Dat were exempted from the operation of the

decree. After three infructuous applications for sale in execution, ultimately, in August 1901, an application for sale was made. At that time the judgment-debtor was dead and the present appellants were brought upon the record in the execution proceedings as his representatives. By some error or oversight a 1 anna and 12 ganda share in the property was put up for sale and sold and purchased by the respondents on the 20th May 1902. The appellants took an objection to the inclusion in the sale of any share in excess of 10 gandas odd, but their objection was disallowed. From the order passed on this objection an appeal was preferred by them, which was also dismissed. Thereupon the suit out of which this appeal has arisen was filed. In it the plaintiffs claimed to have the sale of the share in excess of the share actually hypothecated set aside, and claimed also other relief. The Court of first instance decreed the claim in part, but upon appeal the lower appellate Court reversed the decree and dismissed the suit. From this decree the present appeal has been preferred.

It is argued by the learned vakil for the appellants that the sale of the share in excess of the property which was hypothecated ought to be treated as a mere nullity, that the Court had no jurisdiction to sell that share, and that consequently the plaintiffs were entitled to have the sale set aside. It appears to us that the question raised in this appeal is one which comes within the purview of section 244 of the Code of Civil Procedure, being a question arising between the parties to a suit in which a decree was passed or their representatives and relating to the execution of the decree. This was so decided in a Full Bench case in this Court, namely, the case of *Seth Chand Mal v. Durgz Dei* (1), wherein it was held that where a judgment-debtor dies after the passing of a decree and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which, under section 244 of the Code of Civil Procedure, must be determined in the execution

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deparment and not by separate suit. There is a Full Bench ruling to the same effect in the Calcutta High Court in the case of *Punchanun Bundopadhya v. Rabia Bibi* (1). In that case an objection had been taken by a person who had become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction of the decree was his own property and was not held by him as such representative, and it was held that this was a matter cognizable under section 244 of the Code of Civil Procedure and was not subject-matter of a separate suit. In view of these decisions we think that the decision of the lower appellate Court was correct and we dismiss the appeal with costs.

Appeal dismissed.

1905
June 13.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burdett,
KOMAL PRASAD AND ANOTHER (DEFENDANTS) v. SAVITRI BIBI
(PLAINTIFF).*

Act No. XV of 1877 (Indian Limitation Act) sch. II, art. 58—Suit to recover the value of hundis given as a loan—Limitation—Terminus a quo.

Held that the mere transfer of hundis for the purpose of making a loan of their value when realized does not amount to a loan until money has been realized by the transferee. *Garden v. Bruce* (2) referred to.

THIS was a suit to recover from the defendants the sum of Rs. 11,000 odd alleged to have been advanced by the plaintiff to the defendant, Prag Narain, under the following circumstances. The plaintiff was the holder of four hundis of the aggregate value of Rs. 10,000, and on the 5th of June 1900, on the application of Prag Narain, who was her son-in-law, she transferred these hundis to him as a loan with a view to starting him in a separate business. The suit was instituted on the 11th of June 1903, and one of the main defences of Prag Narain was that it was barred by limitation; he also alleged that the hundis were given, not as a loan, but as a gift. The Court of first instance (Subordinate Judge of Farrukhabad) found that the transaction was a loan and not a gift, and as

* First Appeal No. 270 of 1903, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 14th of September 1903.

(1) (1890) I. L. R., 17 Calc., 711.

(2) (1868) L. R., 3 Q. P., 300.