

Kishen Singh v. Sahay Fukeer Chund (1) it was ruled that a suit for redemption does not debar the mortgagor from afterwards suing the mortgagee in possession for mesne profits payable between the date of suit and the execution of the decree for redemption. In that case the mortgagor, as has been observed by the learned judges in *Satyabadi Behara v. Harabati* (2), had sued under Regulation I of 1798, while the scheme of the Transfer of Property Act is quite different. For the reasons given above I would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed. The order of the learned District Judge remanding the case under section 562 of the Code of Civil Procedure is set aside, and the decree of the Court of first instance is restored. The appellant will have his costs here and in the Court below.

Appeal decreed.

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

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March 12.

WILAYATI BEGAM (PLAINTIFF) v. NAND KISHORE (DEFENDANT).*

Civil Procedure Code, section 244—Question relating to the execution, discharge or satisfaction of the decree—Contest between the holder of a decree for an undivided share of joint property and an auction purchaser pendente lite.

One Wilayati Begam obtained a decree for possession of a share in certain joint and undivided zamindari property, and this decree was executed so far as might be by delivery of formal possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money decree against another co-sharer in the zamindari, and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati Begam applied for mutation of names in her favour, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held* that such a suit was not obnoxious to the prohibition contained in section 244 of the Code of Civil Procedure. *Gulzari Lal v. Madho Ram* (3) distinguished. *Jagan Nath v. Milap Chand* (4) and *Kino v. Rudkin* (5) referred to.

* Appeal No. 53 of 1907 under section 10 of the Letters Patent.

- (1) (1867) 7 W. R., 364. (3) (1904) I. L. R., 26 All., 447.
 (2) (1907) I. L. R., 34 Calc., 223. (4) (1906) I. L. R., 28 All., 723.
 (5) (1877) L. R., 6 Ch. D., 160.

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The facts of this case are as follows:—

Musammât Wilayati Begam was entitled to an undivided share of the estate of one Nihali Begam consisting of a 16 biswansi zamindari share of a mahal and also sir land appertaining thereto. She brought a suit against Ali Sher Khan and others for recovery of this share, and on the 12th of December 1896 got a decree for possession. This decree was not put into execution until the 6th of December 1899. Formal possession was given in 1900. While this suit was pending, one Raghunath Das, who had obtained a simple money decree against Ali Sher Khan and the other defendants to the suit of Wilayati Begam, attached and sold the property in which Wilayati Begam was a share-holder, and at the auction sale the defendant, Nand Kishore, became the purchaser on the 20th of August 1895. In 1899 he got possession of the property so purchased. Wilayati Begam applied in the mutation department to have her name recorded in respect of her share, but Nand Kishore filed an objection and the objection was allowed. Thereupon Wilayati Begam instituted the present suit on the 25th of July 1904, praying for a declaration of her title to the share decreed to her in 1896.

The Court of first instance (Munsif of Etah) decreed the plaintiff's claim, but this decree was reversed on appeal by the Additional Judge of Aligarh, and on second appeal to the High Court, the plaintiff's appeal was dismissed on the ground that the suit was barred by section 244 of the Code of Civil Procedure. It was held that the case fell within the ruling in *Gulzari Lal v. Madho Ram* (1); that Nand Kishore was, as the purchaser in that case, the representative of the judgment-debtor within the meaning of section 244, and that the question raised was one relating to the execution of the decree, and that that question was only determinable by the Court executing the decree. Against this decree the plaintiff appealed under section 10 of the Letters Patent.

Maulvi *Abdul Majid*, for the appellant.

Mr. *G. W. Dillon*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The facts of this case are fully set out in the judgment of the learned Judge of this Court from whose decision this appeal has been preferred. They

are not complicated. The plaintiff Musammat Wilayati Begam was entitled to an undivided share of the estate of one Nihali Begam consisting of a 16 biswansi zamindari share of a mahal and also sir land appertaining thereto. She brought a suit against Ali Sher Khan and others for recovery of this share, and on the 12th of December 1896 got a decree for possession. This decree was not put into execution until the 6th of December 1899. Formal possession was given in 1900. While this suit was pending, one Raghunath Das, who had obtained a simple money decree against Ali Sher Khan and the other defendants to the suit of Wilayati Begam, attached and sold the property in which Wilayati Begam was a share-holder, and at the auction sale the defendant Nand Kishore became the purchaser on the 20th of August 1895. In 1899 he got possession of the property so purchased. The plaintiff appellant applied in the mutation department to have her name recorded in respect of her share, but Nand Kishore filed an objection and the objection was allowed. Thereupon the suit out of which this appeal has arisen was instituted on the 25th of July 1904.

The Court of first instance decreed the plaintiff's claim, but this decree was reversed on appeal, and on second appeal to this Court the learned Judge dismissed the appeal on the ground that the suit was barred by section 244 of the Code of Civil Procedure. He held that the case fell within the ruling in *Gulzari Lal v. Madho Ram* (1); that Nand Kishore was, as the purchaser in that case, the representative of the judgment-debtor within the meaning of section 244, and that the question raised was one relating to the execution of the decree, and that the question was only determinable by the Court executing the decree.

Now, was the question raised one relating to the execution of the decree? This is the important question. There is an aspect of the facts which does not appear to have been present to the mind of the learned Judge, and no doubt was not brought to his notice in argument. Musammat Wilayati Begam was entitled only to an undivided share of the property of Nihali Begam, and could not in her former suit obtain more than a

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decree declaring her title to that share. She could not in that suit have got more than formal possession. She could not obtain physical possession without instituting partition proceedings. The proceedings in execution in that suit, therefore, ended with the delivery of formal possession—*Jagan Nath v. Milap Chand* (1). Wilayati Begam having got formal possession in execution thereby exhausted all the remedies open to her in that suit. Physical possession could only be obtained by partition in the Revenue Court. Now let us see what was the position of Nand Kishore. He purchased the property in dispute *pendente lite*, that is, during the pendency of the suit of Wilayati Begam, and therefore became bound by the judgment which was obtained by the plaintiff against Ali Sher Khan and others. An alienation or assignment *pendente lite* is not permitted to affect the rights of other parties to a suit unless it disables the party who makes the alienation from carrying out the order of the Court, in which case the alienee or assignee must be brought before the Court. In the present case all that the plaintiff was entitled to was a declaration of her title to her share in the estate of Nihali Begam, and there was no necessity to bring Nand Kishore, the purchaser *pendente lite*, before the Court. It was argued before us on behalf of the respondent that the plaintiff ought to have applied to have Nand Kishore added as a party and to have obtained a decree against him. But it appears to us that it was not obligatory on the plaintiff to make any such application. If she had made it, it would have rested in the discretion of the Court to grant or refuse the application. Now a grantee *pendente lite* cannot question the decree or any proceeding in the cause which from the nature of the suit and the relief prayed for might naturally result. The practice under the Judicature Act in England is similar in this respect to that prevailing in this country under the Civil Procedure Code, and in England the addition to the array of parties of a purchaser *pendente lite* is ordinarily not regarded as necessary—*Kino v. Rudkin* (2), also Daniel's Chancery Practice, 6th edn., p. 256. In view then of the fact that the plaintiff appellant in her former suit obtained all the relief to which she was entitled as a co-sharer in an

(1) (1906) I. L. R., 28 All., 722. (2) (1877) L. R., 6 Ch. D., 160, at p. 162.

undivided estate, and that she obtained formal possession of her share in execution of the decree passed in that suit, we do not think that the ruling in the case of *Gulzari Lal v. Madho Ram* (1) bars her right to maintain the present suit. When the defendant resisted her claim to have her name recorded as owner in respect of her share, she was, we think, justified in instituting the suit out of which this appeal has arisen, which is one in substance for the declaration of her title to a share as against the defendant, who in the mutation proceedings denied her title, thereby throwing a cloud on it. She cannot obtain proprietary possession of the share unless she takes partition proceedings, and in so far as the Court of first instance granted her a decree for proprietary possession, that decree cannot be upheld. We allow the appeal, set aside the decree of the learned Judge of this Court and also the decree in the lower appellate Court and decree the plaintiff's claim for a declaration of her title as claimed with costs in all Courts.

Appeal decreed.

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

BALWANT SINGH AND ANOTHER (PLAINTIFFS) v. SHANKAR
(DEFENDANT) *

Wajib-ul-arz—Construction of document—House tax—Cess—Rent.

Under the *wajib-ul-arz* of a village called Radhakund the zamindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples. *Held* that this payment (which was called "gharghanna") was not a house-tax, or cess, but merely ground-rent and did not require special sanction.

THE plaintiff in the suit out of which this appeal arose was the zamindar of the village of Radhakund in the district of Muttra and the defendant occupied a house in the *abadi* of that village. The plaintiff sued to recover three years' rent of the house so occupied by the defendant. The suit was based upon the *wajib-ul-arz* of the village which provided that the zamindar was entitled to one *taka* (that is, 6 pies) per month for every house from the occupants of the village and also from the owners

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* Appeal No. 68 of 1907 under section 10 of the Letters Patent, from a judgment of Griffin J., dated the 25th of July, 1907.

(1) (1904) I. L. R., 26 All., 447.