

1909

ABDUL LATIF
KFRAN
".
NIVAZ
AHMED KHAN.

some illness at the time of marriage which prevented consummation and eventually caused her death, her right to the dower would be transmitted to her heirs," and contends that this is inconsistent with the opinion expressed on page 326 as quoted above. We do not think this is so. What is referred to on page 405 is the case of a valid marriage, where there has been no fraud or coercion. As we have pointed out above, if a marriage was procured by fraud it is invalid. In this case according to the finding of the court below the marriage of the defendant with the deceased Musammat Akbari was the result of a fraud perpetrated upon him, and therefore it was an invalid marriage. It necessarily follows that the defendant was not liable to pay the dower of the deceased and the plaintiff's suit has been rightly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

THAN CHAND (DECREE-HOLDER) v. JAGANNATH (JUDGMENT-DEBTOR).*

Code of Civil Procedure (Act XIV of 1882), section 310A—Act No. IV of 1882 (Transfer of Property Act), section 89—Sale held in pursuance of a decree under section 89 of the Transfer of Property Act.

The appellant obtained an order absolute under section 89 of the Transfer of Property Act, caused the property to be sold and purchased it himself. The judgment-debtor made an application under section 310 A of the Code of Civil Procedure for setting aside the sale. *Held* that in the absence of special rules framed by the High Court for carrying out orders under chapter IV of Act No. IV of 1882, the provisions of the Code of Civil Procedure applied and the application by the judgment-debtor could be entertained under section 310A.

THE facts of this case are as follows:—

The appellant, Lala Than Chand, got a decree for sale under a mortgage in a suit to which the respondent, Jagannath, was a party as puisne mortgagee. The decretal amount was not paid within the time fixed by the Court under section 88 of the Transfer of Property Act, 1882. The mortgagee decree-holder obtained an order absolute under section 89 of Act IV of 1882, and brought the mortgaged property to sale and purchased it himself. Jagannath deposited the purchase money and applied

* Second Appeal No. 673 of 1908 from a decree of Ahmad Ali Khan, officiating Additional District Judge of Aligarh, dated the 29th of April 1908, confirming a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 16th of July 1907.

to have the sale set aside under section 310A of the Code of Civil Procedure, 1882. The lower Courts allowed the application. The decree-holder purchaser appealed to the High Court.

Babu *Surendra Nath Sen*, for the respondent, raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay. He cited *Bashir-ud-din v. Jhori Singh* (1), *Imtiaz Begam v. Dhuman Begam* (2). He further submitted that section 310A of the Civil Procedure Code did apply to a sale held in virtue of an order absolute under section 89 of the Transfer of Property Act. He relied on *Raja Ram Singhji v. Chunni Lal* (3), *Malikarjunadu Setti v. Lingamurti Pantulu* (4), *Krishnaji v. Mahadev Vinayak* (5).

Maulvi *Shafi-uz-zaman*, for the appellant, contended that section 310A of the Code of Civil Procedure did not apply to a sale carried out in pursuance of section 89 of the Transfer of Property Act, 1882. He relied on *Kedar Nath Raut v. Kabi Charan Ram* (6). When an order absolute was passed under section 89, the puisne mortgagee lost his right to redeem the property and he was thereby precluded from availing himself of the equitable provisions of section 310A.

KNOX and GRIFFIN, JJ.—A preliminary objection is raised to the hearing of this appeal, but we do not think it necessary to decide it, as independently of the objection we are of opinion that the appeal must fail.

The appeal before us is a second appeal and the contention raised by the decree-holder is to the effect that section 310A of the Code of Civil Procedure is not applicable to a sale carried out under the provisions of section 89 of the Transfer of Property Act. The sale in the present instance was carried out in pursuance of an order absolute passed under section 89 of the Transfer of Property Act. This High Court has not thought necessary to avail itself of the power given by section 104 of the Act to lay down any rules for carrying out orders under Chapter IV of Act No. IV of 1882. The suit out of which this appeal arose was a suit of the nature provided for in Chapter IV. In the absence of any special rule, the provisions contained in the Code

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(1) (1896) I. L. R., 19 All., 140.

(2) (1907) I. L. R., 29 All., 275.

(3) (1897) I. L. R., 19 All., 205.

(4) (1902) I. L. R., 25 Mad., 244.

(5) (1900) I. L. R., 25 Bom., 104.

(6) (1898) I. L. R., 25 Cal., 703.

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of Civil Procedure for suits and execution proceedings in suits govern suits brought under the provisions of Chapter IV of the Transfer of Property Act. We are, therefore, prepared to hold that the sale which was carried out under Chapter XIX of the Code of Civil Procedure, was a sale to which the provision of section 310A are expressly made applicable and the decision of the lower appellate court is not open to question on this account. We were referred to several cases of the Calcutta and Bombay High Courts. Both of those courts have made special rules and the case decided by those courts differ, therefore, from the present case. Over and above this we should not be inclined to interfere unless it was absolutely necessary, seeing that the decree-holder has got his money and all that he is entitled to, in the interests of justice. He has endeavoured to take advantage of technical procedure in order to retain the mortgaged property, instead of being satisfied with the money due under the mortgage-bond. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

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March 22.

Before Mr. Justice Sir George Knox, Mr. Justice Aikman and Mr. Justice Griffin.

NAJIB-ULLAH (DEPENDANT) v. GULSHER KHAN AND ANOTHER
(PLAINTIFFS).*

Act (Local) No. II of 1901, (Agra Tenancy Act), section 32—Division of occupancy holding—Suit for declaration of right—Suit maintainable.

A suit for a declaration of right to a share in an agricultural holding is maintainable and is not forbidden by the provisions of section 32, Agra Tenancy Act, 1901, *Ashiq Husain v. Asghari Begam* (1) followed. *Ashley Lal v. Janhi Prasad* (2) overruled.

THE facts of this case are as follows :—

One Imam Bux, the father of the parties, was possessed of an occupancy holding of considerable extent. He died before the present Tenancy Act came into operation. He left him surviving a widow and four sons. Under the Muhammadan law the plaintiffs were entitled to 14 *sikams* out of 32 *sikams*, and

* Appeal No. 48 of 1908 under section 10 of the Letters Patent.

(1) (1907) I. L. R., 30 All., 90.

(2) (1903) I. L. R., 29 All., 66.