

We are of opinion that this appeal must prevail. As we have stated above, the Munsif made a decree on the 19th of September, 1906. He ought to have carried out that decree, and with that view, he should, in accordance with the provisions of section 396 of Act XIV of 1882, have issued a commission and made a decree after considering the report of the commissioner. The circumstance of the plaintiff or her agent having resisted the commissioner was not sufficient to justify the dismissal of the suit in its entirety. The court ought to have acceded to the request of the plaintiff's pleader to re-issue the commission and to have seen that the order was obeyed. As the court had passed a preliminary decree, decreeing a part of the claim, it had no authority to nullify that decree by totally dismissing the suit. We allow the appeal, discharge the decrees of this Court, of the lower appellate court and of the court of first instance, and send the case back to the court of first instance with directions to carry out the decree of September 1906. Costs here and hitherto will follow the event.

Appeal decreed and cause remanded.

Before Mr. Justice Richards and Mr. Justice Tudball.

SHEO PARGASH SINGH AND OTHERS (PLAINTIFFS) v. NAWAB SINGH
AND OTHERS (DEPENDANTS).*

*Code of Civil Procedure (1882), section 244—Execution of decree—
Interpretation.*

Held that section 244 of the Code of Civil Procedure (1882) does not apply to a dispute between the decree-holder and a person against whom, though a party to the suit, no decree has been passed. *Kalka Prasad v. Basant Ram* (1) followed.

THE facts of this case were as follows :—

On the 2nd of June, 1866, Raghunandan, Jhumak, Bachu Lal and Padam Nath Saran Singh, mortgaged (usufructuarily) certain property to Jeo Lal and Subh Dayal. On the 15th of December, 1869, the mortgagees sold their rights to Jhumak and Padam Nath Saran Singh. Ambika, the son of Jhumak, and Padam Nath Saran Singh mortgaged certain property including the mortgagee rights of Bachu Lal, to the defendants 1 to 11, and in 1897 these defendants obtained a decree for sale and in execution of that decree they themselves purchased the property. The representatives of

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* Second Appeal No. 1012 of 1908 from a decree of Sri Lal, District Judge of Ghazipur, dated the 30th of June 1908, reversing a decree of Kalka Singh, Munsif of Ballia, dated the 25th of February 1908.

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Bachchu now brought this suit to redeem their share on payment of a proportionate sum. The defence was that the suit was barred by section 244 of the former Code of Civil Procedure. The sale certificate did not mention the mortgagee rights, but the property sold. The original court decreed the suit, but the lower appellate court reversing the decree dismissed the suit.

The plaintiffs appealed.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants, submitted that the widow of Bachchu was only a *pro forma* defendant in the suit under which the sale took place. It was not her business to defend the suit. The property sold was the property claimed, i.e., the mortgagees' rights; consequently section 244 of the former Code did not apply.

Babu *Sital Prasad Ghosh*, for the respondents, submitted that the widow of Bachchu was a party to a suit in which the sale took place. The sale certificate clearly transferred the property and not the mere mortgagee rights. He contended that section 316 of the former Civil Procedure Code was conclusive between the parties. Questions relating to execution, discharge and satisfaction of a decree were to be decided under section 244 of the former Code between the parties to a suit. The widow, who was a party, had a remedy under that section. As she did not go to the court executing the decree the present suit was barred.

The Hon'ble Pandit *Moti Lal Nehru*, in reply, relied on *Kalka Prasad v. Basant Ram* (1).

RICHARDS and TUDBALL:—This appeal arises out of a suit brought for the redemption of certain property mortgaged on the 2nd of June 1866. Four persons mortgaged their property under this document. The property now in dispute is the one-sixth share which belonged to Bachu Lal Singh. The four mortgagors were Raghunandan, Jhumak Singh, Bachu Lal Singh and Padam Nath Saran Singh. The mortgagees were Jeo Lal Singh and Subh Dayal Singh. The mortgagees transferred their rights to Jhumak Singh and Padam Nath Saran Singh on the 15th of December, 1869. After that Ambika, son of Jhumak Singh, and Padam Nath Saran Singh, mortgaged certain property to the defendants Nos. 1 to 11 in this suit including among the mortgaged property

their mortgagee rights in the share of Bachu Lal Singh. The defendants Nos. 1 to 11 brought two suits for sale on the basis of their mortgages in the year 1897. At that time Bachu Lal Singh was dead and the widow Lakiraji Kunwar was made a party to the suits as having an interest in the mortgaged property. At the date of those suits her interest was the equity of redemption under the mortgage of the 2nd of June, 1866, as the widow of the original mortgagor. She was not indebted in any way to the defendants Nos. 1 to 11 under the mortgages in their favour. By their suit they asked for decrees for sale in respect of the mortgagee rights of Ambika and Padam Nath Saran Singh in the share of Bachu Lal Singh. As against Lakhraji and her interest they sought for no relief and this was distinctly stated by their pleader in the course of the suit. Judgement was passed in their favour ordering the payment to them of sums due on their mortgages and in default ordering the sale of the mortgaged property, that is, so far as we are concerned in this case, the sale of the mortgagee rights held by Ambika and Padam Nath Saran Singh. The decrees drawn up on the basis of the judgement in the two suits were drawn in a very unsatisfactory manner. On behalf of the respondents it is urged that those decrees were decrees for the sale of the full proprietary rights in the share of Bachu Lal Singh. On behalf of the appellants it is urged that the decrees are merely decrees for the sale of the mortgagee rights of Jhumak Singh and Padam Nath Saran Singh. Reading those decrees, however, as a whole and taking into consideration the fact that in the details of the property ordered to be sold the property sub-mortgaged in those villages is distinctly mentioned, there can be no doubt that the true interpretation of the decrees is that they were for the sale of the mortgagee rights so far as the particular property in dispute is concerned. This interpretation is consistent with the judgement, and in the case of an ambiguity if it is possible to read the decree consistently with the judgement this should be done. In execution of those decrees the respondents purchased the property sold. The sale certificate, dated the 20th March, 1903, shows that what was sold in auction appears to be comprehensive enough to include the proprietary title of Bachu Lal Singh in the share now in dispute, that is to say, it appears to indicate that

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certain property was sold in execution of the decree which had in no way ordered its sale. The assignees of the heirs of Bachu Lal Singh have now brought this suit for redemption and the respondents defendants have met them with a plea that the equity of redemption no longer exists in them, the plaintiffs, but in the defendant, it having been extinguished by the auction sale which took place in execution of the decree in 1897. The answer to this plea was that the sale passed no title to the defendants not being warranted by the decree. The reply to this was that that was a point which could only have been raised by the plaintiff's predecessor in title under section 244 of the Code of Civil Procedure, 1882, and not having been so raised the plaintiffs are barred from raising it in the present suit. The Court of first instance decreed the claim. The lower appellate court reversed the decision, holding that section 244 is a bar preventing the plaintiffs from going behind the auction sale of 1897. On appeal to this Court it is urged that section 244 of the Code of Civil Procedure does not apply to the present case and the lower appellate court misconstrued the decrees of the 22nd of February, 1897. We have already dealt with the true interpretation of the decrees in question. There remains the question as to section 244 of the Code of Civil Procedure, 1882. In our opinion that section is no bar whatsoever to the relief now claimed by the present plaintiffs. The decrees that were passed were not decrees against the widow of Bachu Lal Singh in any way. As was held in the case of *Kalka Prasad v. Basant Ram* (1), section 244 of the Code of Civil Procedure, 1882, pre-supposes a decree enforceable by the decree-holder against a person between whom and the decree-holder the question referred to had arisen. It has no application to a question arising between the decree-holder and the person against whom there is no decree to be executed. The widow of Bachu Lal Singh was purely a formal party in the previous suit. No relief was asked against her and no decree whatsoever was passed against her and the property she represented. Therefore, under the ruling mentioned above, section 244 of the Code of Civil Procedure, 1882, has no application to the question which arose between her and the decree-holder, that is, the question

(1) (1901) I. L. R., 28 All., 346.

which has now arisen, namely, whether her interest had been improperly sold or not by the decree-holder. In this view the plaintiffs are entitled to redeem.

At the conclusion of the judgement we are asked to consider the first ground entered in the memorandum of appeal to the lower appellate court. It appears that in the court of first instance a plea practically of no substance was raised that Bachu Lal Singh was a member of the joint undivided Hindu family with Jhumak Singh and Padam Nath Saran Singh. No issue was framed on this point and from the statement made by the respondents' pleader in that court it appears sufficiently clear that the point was not pressed in that court. The mortgage deed of the 2nd June 1866 itself, the fact that the shares were separately redeemed, and the fact that Jhumak Singh mortgaged his rights as mortgagee of that very share, all go to show that there is no substance whatsoever in this plea. We do not deem it necessary to remit any issue for a finding on this point. The result is that we set aside the decree of the lower appellate court and reinstate that of the court of first instance with costs.

Appeal decreed.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Piggott.

NANDAN PRASAD (PLAINTIFF) v. AJUDHIA PRASAD (DEFENDANT)*
*Act No. IX of 1872 (Indian Contract Act), section 68—Minor—Necessaries.—
 Hindu law—Joint Hindu family—Money borrowed to defray expenses of
 sister's marriage.*

One of the brothers in a joint Hindu family, consisting of two brothers and a sister, all minors, the sister being about 13 years of age, borrowed a sum of money to provide for the expenses of the sister's marriage. After the death of the borrower the lender sued the surviving brother to recover the sum so advanced from the property of the joint family in his hands. *Held* that the suit was maintainable notwithstanding that the deceased brother was a minor at the time that the money was advanced. *Tulsha v. Gopal Rai* (1),

* Second Appeal No. 1209 of 1908 from a decree of H. David, Judge of the Small Cause Court, exercising the power of a Subordinate Judge, at Cawnpore, dated the 31st of August, 1908, reversing a decree of Pirthi Nath, Munsif of Cawnpore, dated the 22nd of June 1908.

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