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exists, it extends to giving a right of a sharer in one mahal, who is a relation, a preference over a sharer in another mahal who is no relation. We think that the clause, as a whole, can have no other meaning. We, therefore, think the decree of the court below was erroneous and ought to be set aside. Before, however, finally deciding this appeal, it will be necessary to refer an issue to the court below, namely :—

What was the true sale consideration ?

We accordingly refer the above issue to the court below. The court below will receive such evidence relevant to this issue as the parties may adduce. On return of the finding, the usual ten days will be allowed for filing objections.

Issue remitted.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

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July, 11.

MAHADEO SINGH AND ANOTHER (DECREE-HOLDERS) *v.* SHEO KARAN SINGH AND ANOTHER (JUDGEMENT-DEBTORS).*

Hindu law—Daughter's estate—Decree for possession of father's estate obtained by daughter—Right of daughter's sons to execute such decree

The daughter of a separated Hindu obtained a decree for possession of her father's estate against certain trespassers. Before, however, she could obtain possession, she died and her sons applied for execution. *Held* that the daughter represented her father's estate when she brought her suit for possession and that persons who succeeded to the estate were entitled to execute the decree which she had obtained.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal which was as follows :—

"The two respondents Mahadeo Singh and Basdeo Singh, with their mother Lakhpati Kuar, instituted a suit for recovery of possession of certain immovable property against one Jagram Singh, on the allegation that the property in suit belonged to one Sarup Singh, who was the father of Lakhpati Kuar and grandfather of the respondents. Jagram Singh was a collateral of Sarup Singh. He resisted the suit on various grounds. The claim of the respondents was dismissed on the ground that it was premature and that it could not be brought in the life-time of their mother ; but a decree was passed in favour of Lakhpati Kuar in her own right as the daughter of Sarup Singh. She was decreed a daughter's estate. The first court passed the decree in her favour on the 26th of

* Appeal No. 46 of 1913 under section 10 of the Letters Patent,

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November, 1909, and it was upheld on appeal on the 13th of May, 1910. Both Musammat Lakhpati Kuar and Jagram died before the decree could be executed. The two respondents, the sons of Lakhpati Kuar, filed an application in the court of the Munsif of Azamgarh for execution of the decree in favour of their mother against the appellants, who are the legal representatives of Jagram Singh. The appellants opposed the application for execution, on the ground, among others, that the decree in favour of Lakhpati Kuar awarded her a life-estate only and could not be executed after her death. The learned Munsif gave effect to this plea and rejected the application. On appeal the learned District Judge reversed the decree of the first court on the ground that the respondents were the legal representatives of Musammat Lakhpati Kuar, the original decree-holder, and that for that reason the decree could be executed by them. The appellants have come up in second appeal to this Court and press the plea upon which the application was dismissed by the learned Munsif. I think that this appeal must prevail. The question at issue between the parties is not whether the respondents are or are not the legal representatives of Musammat Lakhpati Kuar, but whether the decree in favour of Lakhpati Kuar is capable of execution after her death. It is admitted that the decree was passed in her favour as the daughter of Sarup Singh, giving her a daughter's estate in respect of the property relating to which the decree was passed in her favour. After her death the decree became inoperative. It may be that the two respondents have a right to succeed to that property in preference to the collaterals of Sarup Singh. But that is a question which should be decided between the rival claimants by a regular suit. The mere fact of the two respondents being the daughter's sons of Sarup Singh does not give them the right to apply for execution of a decree, which became inoperative after the death of their mother. The appeal prevails. I set aside the order of the lower appellate court and restore that of the first court. Costs are allowed to the appellants."

The applicants appealed under section 10 of the Letters Patent.

Dr. *Surendra Nath Sen*, for the appellants :—

Musammat Lakhpati, as owner and representative of the estate, brought the suit for recovery of the estate from a person who was a mere trespasser. It was not a mere personal action like a suit for damages; she represented and was acting for the benefit of the whole estate. After her death the appellants became the owners of the estate. Under such circumstances the decree obtained by her cannot cease to be operative after her death. The appellants are entitled to execute it. In her suit it was established that the property was the exclusive property of her father and that she was the heir. It follows as a legal consequence that after her death her sons are the owners. They need not bring a fresh suit to establish the same matter against the same defendant or

his representatives; they are entitled to the benefit of the decree obtained by the former holder of the estate as such.

Maulvi *Muhammad Ishaq*, for the respondents :—

Musammat Lakhpati's success in her suit did not necessarily carry with it the effect that after her her sons would be the owners. The sons might predecease her or be under some disqualification. It was not a judgement *in rem*, but a personal decree. Under the Hindu Law the daughter's sons do not derive their title through the daughter, but through the maternal grandfather. The appellants, not being the heirs of Musammat Lakhpati but of Sarup Singh, are not benefited by the decree in her favour. On her death the question of the succession to Sarup Singh's estate opens up afresh. As sons of Musammat Lakhpati the appellants are not entitled to execute the decree.

Dr. *Surendra Nath Sen* was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—In this case one Musammat Lakhpati brought a suit for possession against certain persons who, she alleged, had taken possession of her father's estate. She succeeded in establishing her case and getting a decree for possession. Before, however, the decree for possession could be executed she died, and thereupon her sons applied for execution, but their application was rejected by the court of first instance. On appeal, this decision was reversed and the application of the appellants was allowed. In second appeal, a learned Judge of this Court held that the decision of the court of first instance was correct and ought to be restored. Hence the present appeal.

In our opinion, the decree of the lower appellate court was correct. Musammat Lakhpati undoubtedly represented her father's estate when she brought the suit, and the persons who succeeded to the estate are entitled to execute the decree which she obtained. Otherwise the reversioners would be obliged to institute a fresh suit and to litigate again the same matters against the very same persons against whom Musammat Lakhpati had established her case. In principle the matter is governed by the decision of their Lordships of the Privy Council when they decided that, for general purposes, the widow represents the estate. We can, in the present case, make no distinction between a widow in possession

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of her deceased husband's estate and a daughter in possession of her deceased father's estate. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs in all courts.

Appeal allowed.

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June, 17.

Before Mr. Justice Sir Paramada Charan Banerji and Mr. Justice Tudball.

ALAM SINGH (PLAINTIFF) *v.* GOKAL SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *order XXXIV, rule* 1—*Mortgage—Suit for sale—Intentional non-joinder of subsequent mortgagee—Effect of such non-joinder.*

Subsequently to the execution of a mortgage of a 4 biswa zamindari share in favour of A. S. the mortgagor executed a further (usufructuary) mortgage of a portion of the same share in favour of A. S. and his brother N. S. A.S. brought a suit for sale on the earlier mortgage, but without making N S. a party thereto. *Held*, that the effect of the nonjoinder of N. S. would not be the total dismissal of the suit, but only of so much of it as related to that portion of the property which was covered by the subsequent mortgage.

THE facts of this case were as follows :—

A simple mortgage, hypothecating a 4 biswa zamindari share, was executed on the 21st of April, 1892, in favour of Alam Singh. On the 28th of June, 1895, a usufructuary mortgage of 1½ biswas out of the 4 biswas was executed in favour of Alam Singh and his separated brother, Narain Singh. Alam Singh brought a suit on the prior mortgage. He did not mention the second mortgage and did not make Narain Singh a party to the suit. Objection on this score was taken at the earliest opportunity by the transferee of the equity of redemption. The existence of the second mortgage was proved, and the plaintiff was called upon to make Narain Singh a defendant. The plaintiff refused to do so on the ground that at that time the suit had become time-barred as against Narain Singh. The court of first instance dismissed the suit on the ground that Narain Singh was a necessary party and had not been impleaded. This decision was upheld by the lower appellate court. The plaintiff appealed to the High Court.

Mr. *E. A. Howard*, for the appellant :—

A subsequent mortagagee is, no doubt, a necessary party and order XXXIV, rule 1, requires him to be impleaded. But failure

*Second Appeal No. 1388 of 1912 from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 7th of June, 1912, confirming a decree of Rama Das, Munsif of Etah, dated the 2nd of February, 1911.