

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.*

KUNDAN SINGH AND OTHERS (PLAINTIFFS) v. SURJA KUNWAR AND OTHERS (DEFENDANTS).\*

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July, 7.

*Decree—Death of judgment-debtor after decree nisi but before order absolute—Order absolute made without bringing all the legal representatives on the record—Sale in execution of decree—Title of purchaser at such sale.*

A Hindu widow was in possession of a one-sixth share of her husband's estate upon a partition made among her sons. One of the sons lived jointly with her. She made a mortgage of her share to raise money to pay off debts legally binding upon the estate. The mortgagee brought a suit against her and obtained the decree *nisi* against her. She then died, and the son who was living jointly with her, was also brought on the record as her legal representative. An order absolute was obtained and the shares of the widow and the son who was joint with her were sold and purchased by plaintiffs. When they applied for mutation of names, they were opposed by the other sons. They thereupon commenced the present action for recovery of possession. *Held* that the order absolute having been obtained against one only out of several heirs, there was not in existence any decree under which the interest of the other heirs could be sold, and consequently the plaintiffs could not obtain possession. *Malkarjun v. Nathuri* (1) distinguished.

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

“The facts out of which this second appeal has arisen are as follows :—

“One Lakhmi, the owner of certain property in the village of Ametha, died leaving three sons, Baldeo, Gulab and Kesri. The three sons mortgaged this property to one Jasram, who, on the 20th of September, 1900, got a decree for sale, in execution of which the property was sold. Baldeo and Kesri each paid one-third of the debt and the sale of their shares was set aside.

“Gulab Singh had died leaving a widow and five sons, Ganga Prasad, Pitambar, Chokhe Singh, Kunjal and Sher Singh. The widow was Musammat Rukmin.

“The sons partitioned the estate of Gulab, and by reason thereof each of them and the widow got a one-sixth in Gulab Singh's share of the mauza Ametha.

\* Appeal No. 90 of 1915, under section 10 of the Letters Patent.

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“ This was the state of affairs when the property was sold. Baldeo and Kesri rescued their one-third shares from the sale as stated above.

“ Gulab's eldest son Ganga Prasad and his widow Rukmin borrowed Rs. 1,700 from one Bhura Singh on the 8th of October, 1900, giving him a simple mortgage of the two one-sixth shares held by them in Gulab's share of Ametha. With the money thus borrowed they paid up the remainder of Jasram's decree and the sale of Gulab's share was also set aside.

“ The other four sons of Gulab contributed nothing to the rescue of the share from the sale.

“ Bhura Singh, on the 15th of September, 1900, brought a suit for sale on the basis of his mortgage against Ganga Prasad and Musammat Rukmin. He also impleaded two prior mortgagees. He obtained a preliminary decree for sale on the 17th of January, 1907, conditional on his paying off the prior mortgages.

“ On the 26th of March, 1909, he assigned his decree to the present plaintiffs, whose names were brought on the record as decree-holders on the 12th of July, 1909. Then Musammat Rukmin died and the case was continued against Ganga Prasad alone, apparently on the ground that he and his mother were living jointly. At any rate the other sons of Gulab were not made parties to the suit. Of these four sons, one (Pitambar) had also died prior to the death of Rukmin. On the 8th of February, 1910, the plaintiffs obtained an order absolute for sale. They paid off the prior mortgagees as directed by the decree. On the 20th of September, 1910, the mortgaged property (i.e., the shares of Ganga Prasad and Musammat Rukmin) was put to sale and purchased by the plaintiffs. They then applied for mutation of names after obtaining formal delivery of possession.

“ They were opposed by the other sons of Musammat Rukmin, who pleaded that there had been no partition in the family; that the name of Rukmin had only been entered for her consolation after the death of Gulab; that she had no share and no legal power to mortgage any share.

“ The Revenue Court granted mutation in respect only of the one-sixth share of Ganga Prasad and refused it in respect to the one-sixth share which had stood in the name of Rukmin.

“ The plaintiffs then brought the present suit for possession of the share of Rukmin. They impleaded all the living members of the family, including the widow of Pitambar, and also a transferee, Durjan Singh, who had purchased the rights of Chokhe Singh (son of Gulab Singh) including the share he had inherited from Rukmin.

“ They pleaded that after the partition between the sons and widow of Gulab Singh, the widow and Ganga Prasad continued to live jointly and that on her death Ganga Prasad alone inherited her one-sixth share.

“ In defence it was pleaded that there had been no partition, that Rukmin's name had been recorded for consolation and she had no power to mortgage, that her other sons were not liable to pay the debt which she had contracted.

“ That in any case they were not bound by the order absolute as they had not been made parties to the suit.”

“ Durjan Singh also pleaded that he had purchased Chokhe Singh's property under a decree on a mortgage prior to that under which the plaintiffs had purchased.

“ The court of first instance held—

(1) That Rukmin was the owner of the share which stood in her name and that it was her *stridhan*, it having come to her on partition between the sons ;

(2) that she had power to mortgage ;

(3) that she and Ganga Prasad were not joint ;

(4) that the other sons of Gulab not having been made parties to the suit on Rukmin's death were not bound by the decree and the suit therefore must fail.

“ It passed no decision on the 2nd and 3rd issues framed by it and dismissed the suit.

“ The plaintiffs appealed and pleaded—

(1) that the decree in execution of which the property had been sold was based on a bond executed in lieu of a debt due from Gulab Singh for the payment of which all the heirs of Gulab Singh were liable ;

(2) that after the partition Ganga Prasad and Rukmin lived jointly ;

(3) that Rukmin's share was not her *stridhan* nor was it inherited by her sons on her death ;

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(4) that the property having been sold to satisfy an ancestral debt, the other heirs of Gulab Singh were bound by the sale and could not now object and the plaintiffs were entitled to possession.

"It was pointed out that the first court had not decided two of the issues. The lower appellate courts state in its judgement that the first court had held the partition not proved. This appears to be an error. The first court's judgement is not very good, but it clearly held in favour of the partition, for it held that Rukmin's share became her *stridhan*. It held it not proved that after the partition Rukmin and Ganga Prasad remained joint and held jointly. The lower appellate court held that there had been a partition and that after that the widow and Ganga Prasad remained joint; that the estate which the widow got, in the absence of all evidence to show that she got an absolute estate with the consent of the sons, was an ordinary widow's estate, which on her death went to the reversioners of her husband. The court then concluded its judgement in the following words:—'It is complained that the lower court has not decided the suit on its merits. This is not so; he has held rightly, though he does not give his authority, that Musammatt Rukmin was not empowered to mortgage and has dismissed the plaintiff's suit on this ground. The appeal fails and is dismissed with costs.'

"Here the appellate court has again erred. The first court's decision on the first issue is as follows:—'Rukmin's name is recorded in the revenue papers over one-sixth of Gulab's estate. I think she owned and possessed that share and was authorized to mortgage it.' The first court dismissed the suit simply on the ground that the other heirs of Gulab not having been made parties to the suit were not bound by the decree (or rather the order absolute).

"The plaintiffs come here on second appeal. They accept the finding that the estate which Rukmin took on partition was that of a Hindu widow with limited powers, there being no evidence to show that at the time of partition an absolute estate was granted to her.

"It is urged (1) that on the facts found all that the defendants (other than Ganga Prasad) are entitled to, is an opportunity to redeem, because they were not made parties to the suit of Bhura

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Singh on the death of Musammat Rukmin, as they ought to have been.

(2) That in any case Ganga Prasad was bound by the decree as he took one-fourth of Rukmin's estate on her death, being one of the four surviving sons, one (Pitambar) having died beforehand leaving only a widow, and that the plaintiffs are entitled at least to recover one-fourth of the share in dispute.

" The problem for solution may, shorn of all unnecessary facts, be briefly stated as follows :—

" A Hindu (Gulab Singh) mortgaged his property (one-third of Ametha). He then died leaving five sons and a widow. The sons partitioned the estate and each got a one-sixth share, and a one-sixth went to the widow (Rukmin). The widow and one son continued to live together.

" The mortgagee sued the widow and all the sons and got a decree for sale and the property was actually sold. The widow and one son (Ganga Prasad) then mortgaged their own shares, obtained money thereby, paid it into court and the sale of all six shares was set aside.

" The widow clearly mortgaged her share to pay off a debt which was legally binding on the estate and on all her sons who were reversioners to the share which she had taken on partition and also were co-judgment-debtors of hers. There was thus clear binding necessity.

" A decree for sale was obtained against her. She then died and only one of her sons Ganga Prasad (out of the four who survived her) was made a party as her heir. The order absolute was made as against him and the property has been sold and purchased by the plaintiffs.

" One point is clear. In so far as the one-fourth share which Ganga Prasad took in Rukmin's one-sixth share is concerned, the plaintiff is clearly entitled to a decree for possession. There remain the rights of the other sons, and the question is whether in the circumstances the plaintiffs are entitled to any relief and, if so, to what relief as against them. The second issue framed by the court of first instance requires no decision, for if Durjan Singh purchased at a sale under a mortgage prior to that which Musammat Rukmin created then that mortgage could not cover

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Musammat Rukmin's share, which is the property now in dispute, which only came to Chokbe Singh on Rukmin's death. Moreover, Rukmin's mortgage was made to save the share of Gulab Singh which had been put up to sale under a mortgage created by Gulab Singh himself. It seems to me clear that as regards three-fourths of the property now in suit the plaintiffs' case must fail. No suit could now be brought to enforce the mortgage against the other sons of Gulab, as it is apparently barred by time. The order absolute which was obtained against Ganga Prasad alone cannot bind the other three sons who were not made parties. My attention has been called to the decision in *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* (1) on the basis of which it is pleaded that the decree against Ganga Prasad binds the other heirs of Musammat Rukmin. With all due deference to the learned Judges who decided that case, I cannot agree with them. It is not shown to me that that decision has been followed by the Madras or any other High Court. That decision goes so far as to hold if, on the death of a defendant, on the application of the plaintiff the name of anybody be brought upon the record, though such person may be only one of several legal representatives or may not be the true legal representative, the decree will be binding and good as against legal representatives who have not been made parties, in the absence of fraud. It is possible for a true legal representative to have no knowledge of the suit and, if not made a party, he may have no opportunity of redeeming a mortgage before execution and final sale of the property.

"Prior to the present Civil Procedure Code, under the rulings of this Court, an application for an order absolute under the Transfer of Property Act had to be made within three years of the decree. No such application could be made now as against the three other sons of Gulab. Rukmin and Gulab were both dead when the application was made in the present case. The sons of Gulab were the owners of the property in the suit. Proceedings ought to have been taken against them all. As regards the rights of those who were not made parties the order absolute and the sale are of no effect. I cannot hold that

(1) (1903) I.L.R., 26 Mad., 230.

Ganga Prasad represented their interests. They were separate from him in every way.

“ The share of Ganga Prasad, however, clearly passed to the present plaintiffs and they are entitled to possession thereof. The result is that I admit the appeal to this extent. I grant the plaintiffs a decree for possession of one-fourth of Musammat Rukmin’s one-sixth share. They will recover their proportionate costs in all courts as against Ganga Prasad. Their claim in regard to the remaining three-fourths must fail, and in regard thereto I uphold the decrees of the courts below.

“ In the circumstances of the case, however, I direct the defendants to bear their own costs in all courts.”

The plaintiffs appealed.

Babu *Piari Lal Banerji*, for the appellants :—

A decree *nisi* for sale had been passed against Musammat Rukmin and the decree established the liability of her estate. In execution of that decree, if all the representatives were not brought on the record, this would not vitiate the sale. The sale passed the entire estate of Musammat Rukmin. If Rukmin had died before the decree then the sale might have been invalid if her proper representatives had not been brought on the record. The Privy Council has clearly laid down that a sale in execution of a decree is valid although in execution proceedings the deceased judgement-debtor is not properly represented. The proper representatives are bound by the sale and cannot impeach it on the ground that they were not impleaded. He discussed *Malkarjun v. Narhari* (1), *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* (2).

Mr. *B. A. Howard*, for the respondents, was not called upon.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—The facts connected with this appeal are fully stated in the judgement of the learned Judge of this Court and it is unnecessary to repeat them. Mr. *Piari Lal Banerji*, on behalf of the appellants, strongly relies upon the ruling in *Malkarjun v. Narhari* (1). In the present case the plaintiffs sued for possession. Their title depends upon an auction sale in the execution of a mortgage decree. In the case relied upon the defendant was in possession. In the present

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(1) (1900) I.L.R., 25 Bom., 337.

(2) (1903) I.L.R., 26 Mad., 280.

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case the plaintiff is not in possession but seeks possession, and he must succeed upon the strength of his own title. Furthermore, there is this great distinction between the two cases. In the case relied upon the property had been sold in execution of a simple money decree which had been obtained during the life-time of the judgement-debtor. In the present case only a decree *nisi* (as it was then called) had been obtained during the life-time of Musamat Rukmin. It was not until after her death, and in the absence of her heirs, except one, that the order absolute was obtained. It seems to us therefore that there was not in existence any decree under which the interest of the other heirs could be sold. We think therefore that the decision of the learned Judge of this Court was correct and should be affirmed. We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

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July, 11.

*Before Mr. Justice Piggott and Mr. Justice Lindsay.*

JAMNA DEI (DEFENDANT) v. LALA RAM AND OTHERS (PLAINTIFFS).\*

*Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 120 and 132—Hypothecation decree—Movable property—Movable property converted into immovable property—Substituted security—Mortgagee purchasing part of the mortgaged property—Merger.*

A hypothecation decree is movable property and the mortgage thereof is one of movable property which is governed by article 120, schedule I, to the Indian Limitation Act. But where movable property has become converted into immovable property, the mortgagee becomes entitled to the substituted security and also to the larger period of limitation prescribed by article 132 of the first schedule to the said Act.

It does not necessarily follow that because a person in the position of a mortgagee purchases a portion of the mortgaged property the mortgage thereby becomes *pro tanto* extinguished. Everything depends upon the terms of the sale, and unless it is stipulated that the mortgage is to be extinguished or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred, it cannot be held that the mortgage merges in the purchase. *Gous Mahomed v. Khawas Ali Khan* (1), and *Jivan Ali Beg v. Basa Mal* (2), referred to.

THE facts of this case are follows :—

On the 29th of November, 1899, a decree was obtained by Daya Ram and others, the predecessors in title of the defendants,

\* First Appeal No. 59 of 1915, from a decree of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 7th of December, 1914.

(1) (1895) I.L.R., 23 Calc., 450. (2) (1897) I.L.B., 9 All., 108.