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AGHA SULTAN KHAN v. MOHARBAT KHAN.

in a suit brought on the basis of the mortgage there seems to be nothing to warrant us in holding that he cannot enforce the same when he is suing for possession of the property which he has purchased at auction. In our opinion the rule of law laid down in *Shib Kunwar Singh* v. *Sheo Prasad Singh* (1) and *Jairaj Mal* v. *Radha Kishan* (2) still holds good and there has been no change so far as the Code of Civil Procedure is concerned.

It having been held, then, that the auction purchaser could challenge the validity of the mortgage in the suit, we find that the lower appellate court has rightly entered into the question of the binding nature or otherwise of the mortgage. On this question it has found in favour of the plaintiff. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Lindsay.

SHADI JAN (PETITIONER) *v.* WARIS ALI AND OTHERS (OPPOSITE-PARTIES.) *

1921

February, 24.

Act No. VII of 1889 (*Succession Certificate Act*), *section* 4—*Muhammdan law —Dower—Husband and wife both dead—Claim by heir of wife against heir of husband for proportionate share of dower debt due by defendant.*

No succession certificate is necessary where the suit is by one of the heirs of the wife to recover from one of the heirs of the husband the proportionate share of the wife's dower the liability to pay which had devolved upon the defendant according to her share by inheritance in the property of the husband. *Ghafur Khan* v. *Kalandari Begam* (3) distinguished.

THE facts of the case are fully set forth in the judgment of LINDSAY, J.

Mr. *Abu Ali*, for the appellant :—

In rejecting the application the lower court relied upon the case of *Ghafur Khan* v. *Kalandari Begam* (3). That case has really no application to the present case. In that case the husband himself from whom the dower debt was due was still alive and was being sued. The debt was, therefore, not split up at the date of the suit. In the present case the original

*First Appeal No. 173 of 1917, from an order of H. E. Holme, District Judge of Bareilly, dated the 24th of August, 1917.

(1) (1906) I. L. R., 28 All., 418. (2) (1913) I. L. R., 35 All., 257.

(3) (1910) I. L. R., 33 All., 327.

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debtor Raza Ali was dead and the liability had descended on his heirs in specified shares under the Muhammadan law. Under the circumstances there is no necessity for the succession certificate at all. Moreover, the balance of the debt for which certificate was not applied for had either been set off or become time-barred at the date of the application. Thus, all that can now be realized of the original dower debt of Rs. 72,000 is only Rs. 2,000 and it would be inequitable to force the applicant to obtain succession certificate for the whole of the original debt and pay court fees on Rs. 72,000. The case ought, therefore, to be decided on equitable principles and not with reference to the ruling relied on by the court below.

The respondents were not represented.

LINDSAY, J. :—This is an appeal against an order of the District Judge of Bareilly rejecting the application of the appellant Musammat Shadi Jan for a certificate under section 4 of the Succession Certificate Act (VII of 1889).

The facts of the case are as follows :—

Ahmadi Begam, the daughter of Musammat Shadi Jan, was the wife of one Raza Ali, and died on the 10th of May, 1914.

She left as heirs her mother, six sons, two daughters and her husband.

It is admitted that the dower debt which Raza Ali owed his wife at the time of her death amounted to Rs. 72,000.

The wife's heirs were, therefore, entitled to specific shares of this debt in accordance with the Muhammadan law of Inheritance, and the share of the wife's mother was $\frac{1}{6}$th. The result was that Musammat Shadi Jan had a good claim against Raza Ali for Rs. 12,000 and to that extent Raza Ali became the debtor of Musammat Shadi Jan.

On the 23rd of October, 1914, Raza Ali himself died leaving as heirs his six sons, his two daughters and his mother Musammat Najm-un-nissa, who became entitled to Raza Ali's estate in the following shares, namely :—

6 sons	60 sihams.
2 daughters	10 ,,
Mother	14 ,,

so that the mother's share of the estate was $\frac{14}{84}=\frac{1}{6}$.

According to Muhammadan law each heir is liable for debts due from the deceased to the extent only of a share proportionate to his share of the estate, so that Raza Ali's mother became liable to pay a $\frac{1}{6}$th share of her son's debts. The latter included, as has been said, a debt of Rs. 12,000 due to Musammat Shadi Jan, and she filed a suit to recover from Musammat Najm-un-nissa the latter's share of this debt *i.e.*, Rs. 2,000. In the suit she impleaded as *pro formâ* defendants the other heirs of Raza Ali. To enable her to get a decree against Najm-un-nissa for this sum she applied to the District Judge for a succession certificate, and the learned Judge, relying upon a Full Bench decision of this Court in *Ghafur Khan* v. *Kalandari Begam* (1), has refused the application on the ground that no certificate under the Act can be granted in respect of part of a debt, treating this sum of Rs. 2,000 as part of the dower debt which Raza Ali once owed to his wife.

The facts of the case now before us are different from those which the Full Bench had to consider, the important distinction being that in the latter case the husband from whom the dower debt was due was still alive and was being sued. In my opinion the principles laid down in the ruling referred to have no application in the present case. We are not dealing here with a claim against the debtor of a deceased person. The creditor, Musammat Shadi Jan, is still alive, and she is making a claim against one of the heirs of her deceased debtor. After his wife's death, Raza Ali, by operation of the Muhammadan law of Inheritance, became the debtor of Musammat Shadi Jan to the extent of Rs. 12,000, and that liability continuing up to the time of his death has now descended in specified shares to his heirs, one of whom is Musammat Najm-un-nissa.

In these circumstances it appears to me that Musammat Shadi Jan is not required by law to take out any certificate under the Act for the purpose of enabling her to obtain a decree for this sum of Rs. 2,000 against Musammat Najm-un-nissa, and I would hold that her application should fail on this ground, and not upon the ground stated by the court below.

As this, then, is not a case in which a certificate should be granted I would dismiss the appeal, making no order as to costs, as the respondent has made no appearance.

(1) (1910) I. L. R., 33 All., 327.

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WALSH, J.—I agree. I am satisfied that no certificate is necessary and that a decree ought not to be refused on this ground.

BY THE COURT:—The appeal is dismissed. We make no order regarding costs.

Appeal dismissed.

1921
February, 28.

Before Mr. Justice Gokul Prasad and Mr. Justice Lindsay.

SHEODAN SINGH AND ANOTHER (PLAINTIFFS) *v.* BHAGWAN SINGH AND ANOTHER (DEFENDANTS).*

Hindu law—Joint Hindu family—Son's liability for father's debts—Simple money debt—Sons not liable during father's life-time.

The pious obligation of a Hindu son to pay his father's debts can only be enforced after the death of the father.

Hence, where on a promissory note executed by the father a simple money decree was obtained against him and in execution thereof a part of the family property was attached, and the sons brought a suit for a declaration that their shares in the property were not liable to satisfy the decree against their father, who was alive, it was *held*, that the sons were entitled to the declaration sought. *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Bharath Singh* v. *Prag Singh* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Sheo Prasad Sinha*, for the appellants.

The respondents were not represented.

GOKUL PRASAD and LINDSAY, JJ.:—The point raised in this case is whether the pious duty of the sons to pay their father's debts can be enforced during the life-time of the father, or, in other words, have the sons the right to object to the payment of of such debts from their shares of the family property when the father is alive? It appears that one Bhagwan Singh executed a promissory note in favour of Musammat Shrimati Mangala Devi. She sued Bhagwan Singh on the promissory note and obtained a decree. She put the decree into execution and proceeded to attach a part of the family property. Bhagwan Singh's two sons Sheodan

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*Second Appeal No. 133 of 1919 from a decree of Jagat Narain, First Additional Judge of Aligarh, dated the 23rd of November, 1918, confirming a decree of Lal Gopal Mukerji, Second Additional Subordinate Judge of Aligarh, dated the 23rd of July, 191

(1) (1917) I. L. R., 39 All., 437; L. R. 44 I. A., 1.

(2) (1917) 43 Indian Cases, 291.