

appeal was pending when the second suit was filed, it was not open to the plaintiff to include the earlier claim in the second suit.

There are two answers to this contention. In the first place, it is obvious that after the plaintiff's application to have the order of dismissal in default set aside was rejected, he had no right of appeal at all. In the next place, even if he assumed mistakenly that he had a right of appeal, it is clear that that appeal was withdrawn from the court of the District Judge on the 2nd of March, 1918, that is to say, a full month before the decree was passed in the second suit which was brought on the 22nd of December, 1917. In other words, the appeal was withdrawn while the second suit was still pending. In these circumstances, we think, the plaintiff cannot be heard to say that he is in any way protected against the operation of order II, rule 2, by the fact that he had an appeal pending in the court of the District Judge at the time the second suit was filed. After the appeal was withdrawn any protection which might have accrued to the plaintiff by reason of the appeal having been filed was taken away and his proper course then was to apply to the court in which the suit was pending and to ask for amendment of the claim and permission to include in the claim a claim for the years 1-1-'14 to 1-1-'17. We hold that the view taken by the court below on this point of law is erroneous and the appeal must, therefore, be allowed to this extent. The result is that allowing the appeal, we direct that the claim of the plaintiff regarding the items accruing due prior to the 1st of January, 1918, is dismissed. The rest of the claim is decreed with proportionate costs against the defendants. The defendant appellant is entitled to proportionate costs in all three courts.

Decree modified.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

HANS RAJ AND OTHERS (DEFENDANTS) v. MUSAMMAT SOMNI (PLAINTIFF).
Act No. IV of 1882 (Transfer of Property Act), section 51—Alienee from Hindu widow without legal necessity—Improvements made by alienee on land so obtained.

A Hindu widow mortgaged with possession certain property which had been of her deceased husband—as was subsequently found—without any

* Second Appeal No. 79 of 1921, from a decree of R. L. Yorke, Additional Judge of Gorakhpur, dated the 23rd of November, 1920, reversing a decree of Puran Chandra Consul, City Munsif of Gorakhpur, dated the 15th of April, 1920.

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legal necessity for so doing, and the mortgagee proceeded to erect a house on the land so mortgaged. The mortgagor died, and her co-widow, on whom the mortgaged land devolved by survivorship, sued for possession and for removal of the house.

Held that the mortgagee was not entitled to claim the benefit of section 51 of the Transfer of Property Act, 1902. A person dealing with a Hindu widow would ordinarily know that she has only a life interest and he can reasonably be expected to make inquiries as to whether there is any legal necessity for the transfer in his favour. *Raja Rai Bhagwat Dayal Singh v. Ram Ratan Sahu* (1) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *S. S. Sastry* (for *Munshi Haribans Sahai*), for the appellants.

Munshi Iswar Saran and *Munshi Harmandan Prasad*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—The dispute in this appeal relates to a house situated in Gorakhpur city. The house was originally an enclosure, belonging to ~~Chunni~~ Chunni died leaving two widows, Musamat Pati and Musammam Somni, and a daughter, Musammam Ganga Dei. In 1910 a partition took place whereby the disputed enclosure was allotted to the share of Musammam Pati. On the 7th of September, 1914, Musammam Pati mortgaged that land with Hansraj for Rs. 150, stating that Rs. 25 out of the same were required for the repairs of her own dwelling house and Rs. 125 for giving a caste dinner in connection with the death ceremonies of her husband. Her husband had died about four years earlier. The court of first instance found that Rs. 25 had been borrowed for the purpose of repairing the dwelling house occupied by Musammam Pati, which was in a dilapidated condition, but there was no legal necessity for borrowing Rs. 125 for giving a caste dinner. It, however, awarded Rs. 600 to the mortgagee on account of the cost of constructing a house over the disputed land after the mortgage. On appeal the Additional District Judge came to the conclusion that there was no legal necessity whatever for the mortgage and that the mortgagee was not entitled to claim the cost incurred by him in constructing a house on the disputed land. He accordingly allowed the claim and directed the defendant to remove the materials of the house constructed by him, within two months from the date of the decree. The defendants have come here in second appeal and the main points argued on their behalf are (1)

that on the facts found the mortgagee was entitled to claim Rs. 150, the entire amount lent by him to Musammat Pati, and (2) that in any event he was entitled to the value of the improvements made by him, under section 51 of the Transfer of Property Act (Act IV of 1882).

With regard to the first point it is stated by the learned Additional District Judge that Musammat Pati's means were sufficient to enable her to repair the house which she was occupying, and that the caste dinner had already been given by Musammat Somni within a fortnight of the death of her husband. In view of those facts it can hardly be said that there was any legal necessity for Musammat Pati to have borrowed the money for repairing the house or to give another dinner to the people of her caste in response to their wishes in the matter. The learned Additional District Judge observes that it was usual and perhaps the duty of the widows to give a caste dinner soon after the death of their husband and that such a feast had been given by Musammat Somni. We are not, therefore, in a position to say that a second feast was necessary and that the mortgage was justified.

With regard to the second point, section 51 of the Transfer of Property Act has no application. It applies only to the case of a transferee of immovable property who makes any improvement in the property, believing in good faith that he is absolutely entitled thereto. But in the case of a Hindu widow a person dealing with her would ordinarily know that she has only a life interest and he can reasonably be expected to make inquiries as to whether there was any legal necessity for the mortgage and whether the widow had any right to make the transfer. The mortgagee cannot be said here to have acted in good faith in dealing with such a widow so as to affect more than her life interest. The learned counsel for the defendants appellants relies on the decision in *Raja Rai Bhagwat Dayal Singh v. Ram Ratan Sahu and others* (1), but in that case the sale was held to have been partially made for legal necessity, and the improvements made consisted of the erection of seven or eight big tanks and the construction of a dyke for the purpose of irrigation, which had the effect of permanently increasing the rental value of the disputed property. Musammat Pati is

(1) (1921) 20 A. L. J., 26.

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dead and her interest has reverted now to the plaintiff by survivorship. It is not necessary to enter into the other questions raised in this appeal.

The learned counsel for the defendants appellants asks for three months' time for removing the materials of the house constructed by the defendants appellants.

The appeal is dismissed except in so far that we extend the time for the removal of the materials to three months from the date of the decree of this Court. The defendants appellants will bear their own costs and pay those of the plaintiff respondent.

Appeal dismissed.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

SITAL SINGH AND OTHERS (DEFENDANTS) v. BALNATH PRASAD (PLAINTIFF) AND MAHANT PURNANAND SADHU UDASI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order XXXIV, rules 4 and 5—Mortgage—Preliminary decree made on a compromise—Application for decree absolute—Plea of satisfaction of preliminary decree out of court.

Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree. Such proceedings are not to obtain any order absolute for sale as used to be the case under section 89 of the Transfer of Property Act, but they are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. *Ramji Lal v. Karan Singh* (1) referred to.

Where the preliminary decree is based on a compromise and is in terms thereof, and is not prepared in strict accordance with order XXXIV, rule 4, it is open to the judgment-debtors, on application made for a final decree, to prove that the preliminary decree has been satisfied out of court. *Mangar Sahu v. Bhatoo Singh* (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. S. M. Sulaiman, Mr. Abu Ali, Babu Piari Lal Banerji and Munshi Sheo Dehal Sinha, for the appellants.

Dr. Kailas Nath Katju, for the respondents.

GOKUL PRASAD and STUART, JJ. :—This is an execution second appeal arising under the following circumstances :—

A compromise decree was passed on the 14th of August, 1917 in favour of Purnanand and Bhagwan Ram against Sital Singh and others, judgment-debtors, under which Rs. 2,950 were to be realized by sale of certain hypothecated property, but in case the judgment-debtors paid Rs. 2,500 to the decree-holders within three months of the date of the

* Second Appeal No. 99 of 1921, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 27th of July, 1920 reversing a decree of Man Mohan Sanyal, Subordinate Judge of Mirzapur, dated the 2nd of February, 1920.

(1) (1917) I. L. R., 39 All., 532.

(2) (1920) 57 Indian Cases, 473.