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neither transferable nor heritable. So when Nanhe Singh died, the rights of occupancy came to an end. His widow Nankai, being permitted to continue cultivation of the holding after her husband's death, acquired in her own right after twelve years the right of an occupancy tenant. Now that she is dead, the question is how is succession to her governed? It is clearly governed by the provisions of section 22 of the present Tenancy Act (Local Act No II of 1901), and the plaintiffs cannot claim the right to succeed her, as they did not (whatever be their title in other respects) share in the cultivation of the holding at the time of her death.

BY THE COURT.—The order of the Court is that the appeal is allowed and the decrees of the courts below are modified, the claim of the plaintiffs to the occupancy holding only being dismissed. Costs are to be in proportion to failure and success.

Appeal allowed.

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February, 6.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BHATELE CHUNNI LAL (PLAINTIFF) *v.* CHAKARPAN AND OTHERS (DEFENDANTS)*.

General rules for Subordinate Civil Courts, Chapter V, rule 4—Execution of decree—Sale of property by Civil Court as non-ancestral—Subsequent suit to set aside sale on the plea that the property sold was in fact ancestral.

Where immovable property is sold by a Civil Court as non-ancestral, the judgment-debtor having knowledge of the sale, and opportunity, if so advised, to raise the question of the nature of the property in execution, he cannot thereafter sue to set aside the sale upon the ground that the property was in fact ancestral and should not have been sold by the Civil Court. *Behari Singh* v. *Mukat Singh* (1) and *Dalip Narain Singh* v. *Parmaoti Bibi* (2) followed.

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

Dr. *Surendra Nath Sen*, for the appellant.

Munshi *Baleshwari Prasad*, for the respondents.

PIGGOTT and WALSH, JJ.:—The object of the suit out of which this appeal arises was to set aside an auction sale, held on the 20th of July, 1915, of property belonging to the plaintiff. The defendants impleaded were the auction-purchaser and the

* First Appeal No. 299 of 1919, from a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 19th of May, 1919.

(1) (1905) I. L. R., 28 All., 273. (2) (1919) I. L. R., 42 All., 58.

decree-holders at whose instance the property was sold. The plaintiff came into court with serious allegations of fraud against the defendants. We must not be understood to hold that on the allegations made the suit was not maintainable. As a matter of fact, however, there was no evidence worth discussing of any fraud on the part of the defendants. On the contrary, it was clear that the plaintiff had knowledge of the execution proceedings and an opportunity of being heard in the execution court. Practically all that was really contended in the court below was that the property in suit, being in fact ancestral property, had been wrongly sold as non-ancestral. In the first place, the plaintiff failed to satisfy the court below on the question of fact as to the nature, whether ancestral or non-ancestral, of the property. The oral evidence on which he relies we could not treat as sufficient in face of the contrary finding of the court below. The point really argued before us has been that the trial court ought to have admitted additional documentary evidence on this point, and the evidence is tendered before us for admission to-day. We think that no good case is made out for the admission of fresh evidence in face of the reasons given by the trial court in its judgment. In any case, however, the question sought to be raised could not influence the decision of the suit. It is quite clear that in the execution court the property in question was treated as non-ancestral to the knowledge of the present plaintiff, then judgment-debtor. It was in fact described by him as non-ancestral in a written pleading which he entered before the execution court. The court was therefore within its jurisdiction in putting up for sale property which, on the admission of the parties concerned before it, was rightly described as non-ancestral. If that description was in fact a mistaken description, the plaintiff is to blame, and there is no proof on this record that he has really suffered substantial injury. On the principles laid down by this Court in the case of *Behari Singh* v. *Mukat Singh* (1), and recently re-affirmed in the case of *Dalip Narain Singh* v. *Parmaoti Bibi* (2), this suit could not succeed, even if by the admission of further evidence the plaintiff was to secure a finding that the property in suit was after all ancestral, although

(1) (1905) I. L. R., 28 All., 273. (2) (1919) I. L. R., 42 All., 56.

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the plaintiff had allowed it to be sold as non-ancestral. This appeal fails and we dismiss it accordingly with costs.

Appeal dismissed.

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February, 9.

Before Mr. Justice Piggott and Mr. Justice Walsh

SURAJ PRASAD (DEFENDANT) *v.* MAKHAN LAL AND ANOTHER (PLAINTIFFS) AND MUSAMMAT KAMLA DEVI (DEFENDANT.)*

Hindu law—Joint Hindu family—Mortgage by father to pay off prior mortgage executed before the birth of his only son—Antecedent debt—Legal necessity.

In 1906, a Hindu who had a son living, executed a mortgage of the joint family property for Rs. 8,000. Of this sum Rs. 3,100 went to pay off a prior mortgage on the property executed by the father before his son was born and Rs. 800 was due to the prior mortgagee on a promissory note. The remainder was paid in cash, and it was found that this portion of the mortgage debt was undoubtedly borrowed for legal necessity. After the death of the father, the mortgagees sued the son and other persons interested, or supposed to be interested, in the mortgaged property on their mortgage.

Held that it was not open to the son to plead that there was no legal necessity to support that part of the mortgage debt which was incurred for the purpose of paying off the prior mortgage. *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Ram Sarup* v. *Bharat Singh* (2) discussed. *Chuttan Lal* v. *Kallu* (3) referred to.

THE facts of this case are fully stated in the judgment of PIGGOTT, J.

Munshi *Narain Prasad Ashthana*, for the appellant.

Munshi *Gulzari Lal* and Babu *Piari Lal Banerji*, for the respondents.

PIGGOTT, J.—The suit out of which this appeal arises was brought to enforce a mortgage-deed of the 7th of June, 1906. The executants were Reoti Prasad, his step-mother Musammat Man Kunwar and his brother's widow Musammat Hukam Kunwar. It is fully established, and has been practically admitted before us in argument, that the whole of the property affected by the mortgage was the property of Reoti Prasad. The ladies concerned were simply living with him as female members of a joint undivided Hindu family in the enjoyment of their right

* First Appeal No. 242 of 1919, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 13th of December, 1918.

(1) (1917) I. L. R., 39 All., 437. (2) (1921) I. L. R., 43 All., 703.
(3) (1910) I. L. R., 33 All., 283.