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definitely held in *Jagar Nath Singh* v. *Sheo Ghulam* (1), that a suit might be brought by a reversioner disputing the operation of the decree where it was contended that it bound the whole estate, and that the old section 244 constituted no bar. But the old section 244 has been altered and the provisions of section 47 of the present Code make it quite clear that the question whether or not an alleged legal representative does or does not occupy that capacity so as to be bound by the decree, is one which is to be decided in the execution court. That is precisely the question raised by this appeal. We repeat that it does not offend against the principle that an execution court cannot go behind the decree. The question raised in this and cognate cases is, what is the true interpretation of the decree, and what is its operative effect, and in order to decide that question it is necessary to investigate, in the case of a Hindu widow, the circumstances under which the contract was entered into upon which the decree is based.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

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March, 16.

Before Mr. Justice Walsh and Mr. Justice Dalal.

RAM SAHAI (APPLICANT) v. MADAN LAL KANHAIYA LAL AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, section 115; *order* XXI, *rule* 16—*Execution of decree—Assignment by way of mortgage—Revision—Subordinate court following a ruling that has no application.*

Although a court subordinate to a High Court is bound to follow the rulings of such High Court, where they are applicable, yet where a subordinate court gave an entirely

* Civil Revision No. 96 of 1925.

(1) (1908) I.L.R., 31 All., 45.

wrong decision through purporting to follow a ruling which had no application to the case before it, it was *held* that a revision would lie from the decision so arrived at.

Order XXI, rule 16, of the Code of Civil Procedure applies to an assignment of a decree by way of mortgage, and it is not necessary for its operation that the whole of the decree-holder's interest in the decree should be transferred.

Kishore Chand Bhakat v. *Gisborne & Co.* (1) and *Endoori Venkataramaniah* v. *Venkatachainulu* (2), referred to.

Where on the subject-matter there is a current of authorities one way in other High Courts and a current of authorities the other way in the High Court to which he is subordinate, a Subordinate Judge cannot be said to have gone outside his jurisdiction or to have exercised it irregularly, in following the decisions of his own High Court by which he is bound when they are in *pari materiâ*, but if he has a doubt about the decision of his High Court he might refer the matter to the decision of the High Court. *Yad Ram* v. *Sundar Singh* (3), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of WALSH, J.

Dr. *Kailas Nath Katju* and *Shambhu Nath Seth*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite parties.

WALSH, J.—We have come to the conclusion that this case must go back. We make it quite clear that we are interfering under section 115 of the Civil Procedure Code on the ground that the learned Judge has not exercised the jurisdiction vested in him in hearing this application on the merits, but we desire to point out that so far as the application of section 115 to this case is concerned, the members of the Court do not take precisely the same view, and the decision at which we have arrived is based on the peculiar circumstances of this case and cannot be regarded as a guide in any other.

(1) (1889) I.L.R., 17 Calc., 341. (2) (1909) I.L.R., 33 Mad., 80.
(3) (1923) I.L.R., 45 All., 425.

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The facts are simple. The present applicant before us, on the 15th of December, 1924, applied to the execution courrt in a suit to which he was not a party, alleging that having experienced great difficulty in recovering from one Kanhaiya Lal a sum due to him of Rs. 9,400 odd he had taken from the said Kanhaiya Lal a mortgage or security bond on the 15th of November, 1924, which bond hypothecated a decree which Kanhaiya Lal had obtained in suit No. 251 of 1923, and he sought by his application, after due notice issued to the parties concerned, " to be brought upon the array of decree-holders", to use his exact language, and to enforce against the judgement-debtor the right which he, the applicant, had under his mortgage through Kanhaiya Lal, the decree-holder. The learned Judge rejected this application on the ground that order XXI, rule 16, did not apply. That question has resulted in a very interesting discussion of law before us. The respondent, in support of the order of the court below, referred us to various other matters which according to his view affected the application in such a way as to show that it ought to fail. These matters are not clearly before us on the record. The learned Judge might have dealt with the matter upon the merits. He did not, however, do that. He denied the right of the applicant to be heard on the merits. On that point we disagree with him and therefore the case must go back.

In arriving at a decision rejecting the application the learned judge based himself upon a reported decision of this High Court, namely, *Mazhar Husain* v. *Musammat Amtul Bibi* (1). The case is a recent one, having been decided in 1922. As a matter of fact, according to the provisions of section 3 of the Indian Law Reports Act of 1875, the learned judge was not bound to look at the report at all. It is a pity that the

(1) (1922) 66 Indian Cases, 679.

courts below do not pay more attention to this provision, which is in a large measure a dead letter. This case illustrates the danger of accepting cases so reported. Unfortunately there is a great deal of inferior reporting in India. Some of the private reports do not receive any editing at all, or little editing worthy of the name, and the legal implications arising from the cases which they report are not considered. In the particular case by which the learned Judge was guided, the judgement of the High Court takes the trouble to say that the facts of the case are clearly stated in the order of the court below. In spite of this hint to those who might desire in future to consult the judgement, the report contains no reference or quotation, either from the order of the court below, or from the judgement to which the High Court referred. We do not doubt that a decision of this Court, unreported, may be cited to a lower court if the record is in the lower court, to enable the lower court to advise itself by what had been done in a previous unrecorded case by the High Court, but that is not the same thing as the production of an emasculated report. We find, on looking at the original record of the case reported in the Indian Cases that, as a matter of fact, the applicant in that case was the holder of a decree which he had obtained upon his assignment of mortgage, and that therefore the original assignment under which he claimed to apply under order XXI, rule 16, had become merged in a decree. There is nothing in the judgement of the High Court to show that that particular aspect of the matter influenced their judgement. On the other hand, there is nothing to show that it did not. A study of this case by the Judge in the court below, which of course he had no opportunity of making,

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would have shown that it dealt with a different set of circumstances from the case with which he was dealing and that it did not apply. The result is that he has either denied himself jurisdiction in rejecting the application by following an authority which had no application, or he has irregularly exercised his jurisdiction so as to defeat the claim, if there is one, of the applicant, by applying a decided case which had no application. It would be a great misfortune if the High Court, in a simple matter of a miscarriage of recognized legal procedure, should be unable to interfere, and we are agreed that, whichever branch of section 115 is looked at, the section applies to this case.

The decision in *Mazhar Husain* v. *Musammat Amtul Bibi* (1), to which I have referred, undoubtedly contains dicta which go far beyond the particular matter disposed of, and which raise very serious questions of practice under this rule, and, although I recognize that what I am going to say is mere obiter, nonetheless it seems to me difficult to regard this case as an authority, mainly for the reasons that, firstly, the case was clearly not argued very seriously before this High Court, secondly, because there are expressions in the rule to which I will refer in a moment which seem to me to raise serious doubts as to the correctness of the dicta, and, thirdly, because the decision is contrary to the current of decisions in the Calcutta High Court and in the Madras High Court, which are the only High Courts, so far as we know, in which this matter has been considered, except that the CHIEF JUSTICE of the Punjab in another case has cited these authorities without expressing any doubt as to their soundness, and these cases were not cited before the Allahabad High Court.

(1) (1922) 66 Indian Cases, 679.

Order XXI, rule 16, provides as follows :—

"Where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder".

Walsh, J.

I have intentionally omitted the alternative which occurs at the commencement of this rule. An argument was addressed to us that what was meant by the rule was the whole interest of the decree-holder, and the words "the interest of any decree-holder" were relied upon. Those words have no application to the case before us. The phrase in which the term "the interest of any decree-holder" occurs is an alternative to a decree. The rule therefore running "where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder" clearly shows that the rule contemplates, at any rate in the case of a joint decree, the transfer, by assignment or by operation of law, of the interest of any of the joint decree-holders, not covering therefore the whole interest in the decision.

Regarded independently of any authority, it seems to me that this provision is quite clear and the first duty of a court is to interpret the words as it finds them, unless, in a case of doubt or difficulty, it desires to seek guidance from previous interpretations. I am unable to understand how it can be suggested that the transfer by a mortgage or hypothecation bond of a decree is not a transfer by assignment in writing. I can find nothing in the general law prohibiting me from putting that interpretation upon the language and nothing in the Code

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inconsistent with the right of a mortgagee of a decree to apply under this rule.

With regard to the argument based upon the contention that the rule applies only to the whole of an interest in a decree and not to a fractional part, I can only say that if that were the true view, it seems to me impossible to give effect to the words "operation of law". The transfer contemplated is not merely by an assignment in writing, but by operation of law also. These words are invariably used with reference to insolvency, or death, when by operation of law the whole or the part interest in a decree vests in the official receiver in insolvency, or in a legal representative by reason of death. If the contrary view were held the result would be, for example, that if a Muhammadan died intestate, leaving a widow and children, all of whom by operation of law became entitled to a fractional interest in any decrees which he held, and it might happen that the only estate he had consisted of unenforced decrees, they would be unable to enforce their rights against the judgement-debtors, under this rule. I cannot believe that such a result was intended. I asked the learned advocate supporting this order: "Assuming that a mortgagee or a transferee, either by assignment or by operation of law, had a right to have his application considered by the court, under what rule could he apply if it was not under this order XXI, rule 16?" and to that question I received no answer and I am satisfied that no answer can be given.

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I, therefore, take the view that it is wrong to say that this rule does not apply to an assignment by mortgage or to any transfer which has the effect of conferring upon the transferee or assignee a merely fractional interest in a decree and I am confirmed in this view by the fact, as I have already stated, that

in Calcutta and Madras this question has been settled for nearly thirty years. I refer to *Kishore Chand Bhakat* v. *Gisborne & Co.* (1) and *Endoori Venkataramaniah* v. *Venkatachainulu* (2). These cases, I think, rightly draw attention to the fact that there is no prohibition in the Code to which reference can be made making such an application as this, one which has no legal foundation, and in both cases the Judges were careful to point out that it was for the execution court below to consider, with all the parties before it, the respective rights of each. These are the two cases to which the CHIEF JUSTICE of the Punjab referred in *Mohkam Chan* v. *Ganga Ram* (3) without suggesting, although he was deciding against the applicant, that there was any doubt as to the soundness of the decisions.

The case that has troubled us is the decision of a Full Bench in ***Yad Ram*** v. *Sundar Singh* (4) to which I happen to have been a party, although I dissented from the decision because I was satisfied that the law had been wrongly applied and that there had been a miscarriage of justice, but I desire faithfully to follow that decision which took the view that where on the subject-matter there is a current of authorities one way in other High Courts and a current of authorities the other way in the High Court to which he is subordinate, a Subordinate Judge cannot be said to have gone outside his jurisdiction, or to have exercised it irregularly, in following the decisions of his own High Court, by which he is undoubtedly bound when they are in *pari materiâ*. Mr. Justice PIGGOTT and myself pointed out that if the Subordinate Judge had a doubt about the decision of his own High Court, having regard to other decisions, or other views by which he was equally impressed, he might

(1) (1889) I.L.R., 17 Calc., 341. (2) (1909) I.L.R., 33 Mad., 80.
(3) (1915) 29 Indian Cases, 654. (4) (1923) I.L.R., 45 All., 425

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resort to a well-known provision of the Code, order XLVI, rule 1, and refer the matter to the decision of the High Court. When so referred, it is open to this High Court, if it considers that the decision otherwise binding upon the subordinate courts requires reconsideration, to refer the matter to a Full Bench, and I pointed out in my judgement that a Subordinate Judge need not be too timorous about stating it if he really entertains doubt, and states it for the purpose of having it removed, not merely for the case in question but for the benefit of litigants in general and the guidance of the lower courts.

The case before us is not on all fours with that Full Bench decision. We think this is clearly a case in which it is our duty to remit it to the lower court to be dealt with on the merits. I have already pointed out that what I have said with regard to the interpretation of order XXI, rule 16, is merely obiter. If the learned Judge should ultimately be of opinion that the applicant has a right upon the merits and he is prepared to enforce such right by an order, he should pass such order, but if he should still entertain doubts, having regard to the dicta to which we have referred in the report in Indian Cases and to the foregoing expression of opinion about the real interpretation of this rule, he should exercise the powers conferred upon him by the Code under order XLVI, rule 1; but we would implore him, before he takes any step of that kind, to deal with the position, the facts, and the merits and to come to a final decision upon the merits as though the matter were properly before him and if he does this, whatever the view of law taken in any subsequent proceedings may be, the court ultimately disposing of the matter will not be embarrassed, as we have been, from coming to a final decision.

DALAL, J.—I agree with the order of remand passed by my learned brother and shall state my

reasons. The revisional jurisdiction of this Court has been confined within narrow limits by various Divisional Bench and Full Bench decisions and whatever one's private opinion may be, those decisions have to be followed for the sake of consistency.

In the present case I shall only deal with the question whether a revision lies in the present case or not. The mortgagee of a decree applied for execution under order XXI, rule 16, and the lower court held that the applicant was not such an assignee as is contemplated under the terms of that rule and dismissed the application. If this opinion had been reached by the learned Subordinate Judge on reasons of his own, I would have held that no revision application lay to this Court. The applicant's learned counsel, Dr. *Katju*, argued that the lower court had failed to exercise a jurisdiction vested in it because it had dismissed the application of the mortgagee and so revision would lie under section 115 (*b*) of the Civil Procedure Code. In my opinion such an argument is untenable. Jurisdiction, in that case, would depend only on the result; if an application is granted, it may be argued that the lower court exercised the jurisdiction not vested in it and if it is refused, it may be argued that it failed to exercise a jurisdiction which was vested in it. In both cases, in my opinion, the court would have exercised jurisdiction and there would be neither illegality nor material irregularity even if the court went wrong in applying any particular provision of law to the matter before it.

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In the present case, however, the lower court did not exercise its own judgement but felt itself bound by a ruling of this Court. If the ruling had been applicable I would have held that the present application could not be entertained by this Court. A

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subordinate court is bound to follow a decision of a Bench of this Court, see *Puttu Lal* v. *Parbati Kunwar* (1), and in doing so it would be exercising jurisdiction rightly and not irregularly—*per* PIGGOTT, J., in *Yad Ram* v. *Sunder Singh* (2). The case quoted by the lower court is that of *Mazhar Husain* v. *Musammat Amtul Bibi* (3). The facts of that case were entirely different. The question there was whether a decree-holder who had obtained a decree for sale of another decree could be considered an assignee from the decree-holder of the second decree. The appellant in that case had obtained a decree for the sale of a decree mortgaged to him, and, instead of putting the second decree to sale, he applied to be substituted in place of the decree-holder. His proper remedy was to put the decree in favour of the judgement-debtor to sale, and only in the case of his purchasing that decree he would become an assignee of that decree. The mortgage in his favour had merged in the decree and he was no longer the mortgagee of the decree. The learned Judges held that up to the date of the delivery of that judgement the decree had not been transferred to anybody by assignment in writing. That was correct, because the decree had not been put up for sale in execution of the decree in favour of the appellant. Then occurs a cryptic sentence: "There is considerable distinction between the transfer of rights as a decree-holder by mortgage and a transfer by assignment in writing or by operation of law of the decree itself". This sentence has no relation whatsoever with the facts of the case before the learned Judges and I am of opinion that there has been a slip in dictating the judgement and the word "by" is really a slip for "under" or "on foot of". The learned Judges in my opinion desired to draw a

(1) (1915) I.L.R., 37 All., 359 (2) (1923) I.L.R., 45 All., 425.
(3) (1922) 66 Indian Cases, 679.

distinction between the rights of a decree-holder on foot of or under a mortgage and the rights of a transferee by assignment in writing. Such a distinction does obviously exist, but that distinction is not one in favour of holding that a mortgagee of a decree is not an assignee thereof under order XXI, rule 16.

The lower court wrongly considered itself bound by a Bench ruling of this Court, which has no reference to the facts of the case before it, and in doing so failed to exercise its own judgement and by such failure failed to exercise a jurisdiction vested in it. This is the ground on which I agree in the order proposed.

BY THE COURT.—The order of the Court is that the case be remitted to the lower court to dispose of the application upon the merits. Costs of this Court as well as of the court below will abide the result.

PRIVY COUNCIL.

RAM CHARAN LONIA AND OTHERS (DEFENDANTS) *v.* BHAGWAN DAS MAHESHRI, (SINCE DECEASED), AND OTHERS (PLAINTIFFS).*

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J.C.*
April, 15.

[On appeal from the High Court at Allahabad.]

Hindu law—Joint family property—Alienation by karta—Improvident contract of sale—Invalidity of contract—Purchaser discharging mortgage debt—Purchaser in possession under decree—Terms of re-possession by family.

In 1912 the karta of a joint Hindu family contracted to sell substantially the whole immovable property of the family. The discharge of a debt under a simple mortgage of 1909 at compound interest, which was binding on the property, was urgently necessary; the price fixed made the sale a prudent one if payment was made forthwith. Owing, however, to a contract previously made for a sale of part of the property, the purchasers were in a position under the contract to defer

* *Present* :—Viscount DUNEDIN, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMEER ALI.