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RUP NARAIN SINGH v. HAR GOPAL TEWARI

was, no doubt, not "authorized to transfer" the property mortgaged, but on the passing of the order of discharge the mortgaged property re-vested in him and the mortgagee could, therefore, enforce the mortgage by sale of the mortgaged property.

Exception is also taken to the finding of the lower appellate court that Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property. [After discussing the evidence on this question the judgment proceeded.] We have, therefore, no hesitation in agreeing with the lower appellate court that both Rup Narain and Lachhmi Narain were subsequent transferees of the mortgaged property.

In our judgment the decree appealed against is perfectly correct and we accordingly dismiss this appeal with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Thom

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CHHANGA MAL AND OTHERS (JUDGMENT-DEBTORS) *v.* RAM DULAREY LAL (DECREE-HOLDER)*

Civil Procedure Code, order XXII, rules 8, 11, 12—Applicability of rule 12 to execution appeal—Abatement of appeal—Appellant's insolvency—Refusal of receiver to give security for costs—Dismissal of appeal.

Order XXII, rule 12 of the Civil Procedure Code does not exempt pending appeals from the operation of rule 8 of that order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also rules 3, 4 and 8 would never apply.

So where in a pending appeal by the judgment-debtor against an order in execution the appellant became an insolvent, and the receiver refused to give the security for costs required under order XXII, rule 8(1), it was *held* that the appeal must be dismissed under rule 8(2).

*First Appeal No. 131 of 1932, from an order of Shyam Behari Lal, Subordinate Judge of Farrukhabad, dated the 18th of June, 1932.

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CHHANGA MAL v. RAM DULAREY LAL

Mr. *A. Dharam Das*, for the appellants.

Messrs. *G. S. Pathak* and *M. L. Chaturvedi*, for the respondent.

SULAIMAN, C. J., and THOM J. :—This is a judgment-debtors' appeal from an order refusing to set aside a sale during the pendency of the appeal. The appellants judgment-debtors became insolvents and a receiver was appointed of their estate. An application was made on behalf of the respondents under order XXII, rule 8 sub-rule (1), calling upon the receiver to furnish security for the costs of the appeal. The alternative prayer contained in the application is that the appeal should be dismissed.

The learned advocate for the appellants has urged that order XXII, rule 8 has no application to this case, because this is an appeal arising out of execution proceedings and is, therefore, exempted by virtue of rule 12 of that order. His contention is that if the proceedings originally were in execution, then rule 12 would apply even to appeals from orders arising out of these proceedings.

There is, no doubt, some authority in support of this contention. In the case of *Mir Khan* v. *Sharfu* (1) it was held by a learned Judge of the Lahore High Court that rules 3 and 4 of order XXII had no application to an appeal arising out of execution proceedings, by virtue of the provisions of rule 12 of that order. It appears that the majority of the Full Bench of the Patna High Court in *Hakim Syed Muhammad Taki* v. *Fateh Bahadur Singh* (2) has taken the same view. One learned Judge, however, took the contrary view.

On the other hand, there is a judgment of a Bench of the Madras High Court in the case of *Sundayee Ammal* v. *Krishnan Chetti* (3) which does not appear to have been cited before the learned Judges of the Patna High Court and in which it was held that in a

(1) (1923) 74 Indian Cases, 577. (2) (1929) I. L. R., 9 Pat., 372.
(3) (1928) I. L. R., 51 Mad., 858.

Letters Patent appeal against an order in execution of a decree the legal representative of the deceased appellant can be brought on record for proceeding with the appeal.

By virtue of the provisions in rule 11, rule 8 would apply to appeals just as much as to suits. Rule 12 provides: "Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

Fresh applications for execution, unless the principle of *res judicata* applies, can be made from time to time so long as limitation has not expired. It is, therefore, obvious why there need be no abatement of the suit in an execution proceeding. But an appeal stands on quite a different footing. Successive appeals cannot be filed, if one has already abated. It seems to us that rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also rules 3, 4 and 8 would never apply. If this were the correct view, the result would be that the death of the appellants or of the respondents would in no way result in the abatement of the appeal at all.

We are of opinion that rule 12 would not exempt pending appeals even though they arise out of execution proceedings. We think that rule 8 applies to this appeal.

There is another difficulty in the way of the appellants. Strictly speaking, the order passed by the court below was not an order passed by an execution court in the ordinary sense of the word which would amount to a decree, but it was an appealable order, which if passed by a Munsif or a Subordinate Judge would not be open to a second appeal.

With great respect to the learned Judges of the Lahore and Patna High Courts we are unable to accept their view that rules, 3, 4 and 8 cannot apply to a pending appeal of this kind.

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The receiver, as stated above, has declined to furnish security. The appeal must accordingly be dismissed with costs, which may be recovered as a debt against the estate of the original appellants.

Before Mr. Justice Thom and Mr. Justice Rachhpal Singh

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MUHAMMAD QAMAR SHAH KHAN (PLAINTIFF) *v.* MUHAMMAD SALAMAT ALI KHAN (DEFENDANT)*

Agra Tenancy Act (Local Act III of 1926), section 226—Suit for profits—"Co-sharer"—Mutwalli—Whether mutwalli can maintain suit for profits—Wakf—Status of mutwalli in a private wakf.

A certain village was wakf property, the plaintiff and the defendant being the two mutwallis, and the plaintiff's share as recorded in the khewat being one-third. In a suit for profits under the Agra Tenancy Act brought by the plaintiff against the defendant, who was the lambardar, it was objected that a mutwalli was not a "co-sharer" and could not bring such a suit.

Held that a mutwalli was a "co-sharer" within the meaning of the Agra Tenancy Act, though he might not be a person having full proprietary interest in the share held by him. For the purposes of the Act a co-sharer is a person whose name is recorded in the khewat as a co-sharer and who is jointly and severally liable with other co-sharers for the land revenue and whose revenue is payable through the lambardar under section 144 of the Land Revenue Act. Any person whose name is recorded in the khewat as holding a share in the village is entitled to maintain a suit for profits, regardless of the fact whether or not he holds it as proprietor or as manager or mutwalli.

Per curiam—In the case of a private wakf a mutwalli holding the wakf property cannot be said to be a mere manager or superintendent, but is, practically speaking, the owner, with one limitation—that he cannot make a transfer; in every other respect his position is the same as that of an owner.

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*Second Appeal No. 711 of 1930, from a decree of J. R. W. Bennett, District Judge of Pilibhit, dated the 22nd of February, 1930, confirming a decree of Abdul Majid Khan, Assistant Collector, first class, of Pilibhit dated the 29th of December, 1925.