

powers of the court are to be exercised only on behalf of the innocent is illustrated by the case of *Hulse v. Hulse*, where the court refused to make a decree absolute on the ground that the petitioner had been guilty of adultery after the decree *nisi*. If then I were to make the decree absolute at the instance of the respondent, I shall be in effect giving relief not to the innocent but to the guilty, and upon the ground of her own guilt." That case has been followed in numerous other cases, notably in *Lewis v. Lewis* (1) and *Rutter v. Rutter* (2). It appears to us that this principle should be followed in India on an application to confirm a decree by a lower court, under section 17. Until confirmation of decree the proceedings are not finished, the marriage is not dissolved, and it appears to us to be contrary to principle that a marriage should be dissolved on the motion of the guilty party. On this ground, therefore, we hold that this application does not lie, and we dismiss it accordingly.

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## APPELLATE CIVIL

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*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice King*

SHANKAR LAL AND OTHERS (APPLICANTS) v. SHYAM SUNDAR  
LAL. (OBJECTOR)\*

1934  
March, 23

*Civil Procedure Code, section 47; order XXII, rules 5, 12—  
Execution of decree against assets of deceased judgment-  
debtor—Dispute between two persons each claiming to be  
heir—Decision by execution court of such dispute—Appeal.*

In course of execution of a decree a dispute arose between two persons as to which of them was the heir of the deceased judgment-debtor; the decree-holder sought to execute the decree against the assets of the deceased judgment-debtor and had impleaded both these persons. The execution court went into this question and determined it in favour of one of the persons. *Held*, that the dispute was not one between the decree-

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\*First Appeal No. 391 of 1933, from a decree of Muhammad Taqi Khan, Subordinate Judge of Farrukhabad, dated the 10th of March, 1933.

(1) [1892] P., 212.

(2) [1921] P., 421.

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holder on the one side and the judgment-debtor or his representative on the other, and the determination of the dispute did not fall under section 47 of the Civil Procedure Code, and no appeal lay therefrom.

Dr. *N. C. Vaish*, for the appellants.

SULAIMAN, C.J., and KING, J.:—This is an appeal by certain persons who claimed to be the relations on the father's side of the deceased judgment-debtor, Mst. Ram Devi. The decree-holder, in execution of his decree against Mst. Ram Devi who was alleged to be in possession of her estate as a Hindu daughter, had sought to execute the decree by sale of her assets and had impleaded these applicants as well as the husband of the deceased, namely, Shyam Sundar. The decree-holder was not concerned with the question who was the real heir to the estate of the deceased because all that he was interested in was the realisation of the amount due to him out of the assets of the deceased.

Shyam Sundar put forward the case that the deceased had left a minor son on her death and therefore the estate devolved on him and after him on the husband of the deceased. The relations on the father's side of Mst. Ram Devi put forward the case that the minor son had predeceased Mst. Ram Devi and that accordingly on her death her property devolved on her relations on the father's side.

Under order XXII, rule 12 it was not absolutely necessary for the court below to apply the provisions of rules 3, 4, and 8 of that order to an execution proceeding, but it was necessary in order to avoid all future trouble to have all possible claimants before the court in case they wanted to urge any objection. The court below, however, went into this question, thinking that it was its duty to proceed under order XXII, rule 5 and determine the question who was the heir of the deceased. It has recorded a finding in favour of the husband Shyam Sundar and against Mst. Ram Devi's relations on the father's side. Obviously this was a decision of a dispute

between two sets of persons who were claiming to be the heirs of the deceased judgment-debtor. It was not at all a dispute between the decree-holder on the one side and the judgment-debtor on the other.

It is quite clear that if in a suit an order had been made under order XXII, rule 5 determining such a question, no appeal would have lain therefrom as no appeal is provided in order XLIII, rule 1. It is equally clear that even in an execution proceeding the order is a summary order deciding who should be treated for the purposes of the execution as the representative of the deceased. It does not purport to decide the dispute between these two sets of claimants for all purposes so as to operate as *res judicata* in any subsequent litigation that may result out of an independent suit. The effect of the order merely is that the sale would be binding on both these sets of defendants. It would in no way affect the title to any property that may be left over after the decree is satisfied. In these circumstances we do not think that any appeal lies to this Court.

There seems to be some conflict between the decision in *Parsotam Rao v. Janki Bai* (1) and the decision in *Rajbahadur v. Narayan Prasad* (2). But both these cases related to suits and not to execution proceedings. In the present case we are of opinion that the order passed by the court below does not fall under section 47 of the Civil Procedure Code because in our opinion the question has not arisen between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, within the meaning of that section and it is therefore not necessary to consider which of the two rulings referred to above should be preferred. We accordingly dismiss the appeal.

(1) (1905) I.L.R., 28 All., 109. (2) (1926) 24 A.L.J., 546.

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