

performance applies, the non-registration of the document would be no bar to the applicability of section 53A or its admissibility in evidence

We accordingly allow this appeal and setting aside the decree of the lower appellate court restore that of the first court with costs in all courts.

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MAHADEI
KUNWAR
v.
PADARATH
CHAUBE

REVISIONAL CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

MUHAMMAD ISMAIL (JUDGMENT-DEBTOR) v. JOHRIMAL
SITALPRASAD (DECREE-HOLDER)*

1937
April, 29

*Civil Procedure Code, section 60; order XXI, rules 53, 64—
Attachable property—Preliminary decree on mortgage—Pro-
cedure after attachment—Not executable but saleable.*

A preliminary decree is property within the meaning of section 60 of the Civil Procedure Code and can be attached in execution of a decree, although the preliminary decree may not be executable as it stands. The correct procedure, after attachment of a preliminary decree, is to sell it under order XXI, rule 64, since it does not fall under rule 53(1), which is concerned only with decrees for payment of money and final decrees for sale on a mortgage; the attaching decree-holder can not, upon the attachment, proceed to apply for the preparation of a final decree.

Mr. *Shah Jamil Alam*, for the applicant.

The opposite party was not represented.

COLLISTER and BAJPAI, JJ.:—Muhammad Ismail, the applicant in this case, was an objector in certain execution proceedings. He instituted a suit for the realisation of the unpaid consideration under a mortgage bond and he obtained a preliminary decree upon an arbitration award for a sum of Rs.2,000 odd. This decree was dated 7th February, 1933. The opposite party thereafter obtained an *ex parte* decree for Rs.700 odd against Muhammad Ismail and in execution of his aforesaid decree he attached the preliminary decree of his judgment-debtor Muhammad Ismail. Subsequently

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the opposite party applied in the court of the Munsif for preparation of a final decree in pursuance of the aforesaid preliminary decree of Muhammad Ismail. It was objected that a preliminary decree was not attachable, but that objection has been overruled by the court below. Muhammad Ismail has come to this Court in revision and the same point is taken before us. On his behalf it is argued by learned counsel that section 60 of the Civil Procedure Code must be read with order XXI, rule 53 which provides for attachment of decrees, and it is contended that the decree contemplated in rule 53 is an executable decree and does not include a preliminary decree, which, as it stands, is not executable. This argument is based on the words "proceed to execute the attached decree" in clause (2) and on the words "entitled to execute such attached decree" in clause (3) of rule 53.

Clauses (1) to (3) of order XXI, rule 53 are concerned with the method of attachment of decrees for the payment of money and decrees (i.e., final decrees) for sale in enforcement of a mortgage or charge, and they confer upon the holder of the decree sought to be executed the power to execute the attached decree. In the case of other decrees, clause (4) prescribes the manner of attachment, but is silent as to how they should be realised. There can be no doubt that a preliminary decree is property within the meaning of section 60 of the Civil Procedure Code. A preliminary decree may not be executable as it stands, but in our opinion there was nothing to prevent the opposite party from attaching this preliminary decree as being property of his judgment-debtor within the meaning of section 60.

We are fortified in our view by a decision of a Bench of the Calcutta High Court in *Mono Mohan v. Kali Kinkar Chakravarty* (1), where it was held that a preliminary decree for accounts was a saleable property over which the decree-holder has a disposing power

(1) A.I.R., 1935 Cal., 751.

which he may exercise for his benefit and that such decree was liable to attachment under section 60. It is pointed out by learned counsel for the applicant that in that case the provisions of order XXI, rule 53 were not considered; but the reason for this is obvious inasmuch as rule 53 is only concerned with decrees for payment of money and decrees for sale in enforcement of a mortgage.

The question remains, how is the attached decree to be realised? Since it is not a decree such as is contemplated in order XXI, rule 53 (1) of the Civil Procedure Code but since it is nevertheless property within the meaning of section 60, the correct procedure is for the court to sell it under order XXI, rule 64.

We accordingly allow this application to the extent that we set aside the lower court's order for preparation of a final decree and we direct that the procedure laid down in order XXI, rule 64 and the succeeding rules be followed.

In the circumstances we make no order as to costs.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Bajpai

MOOL CHAND (DEFENDANT) *v.* CHAHTA DEVI AND
ANOTHER (PLAINTIFFS)*

1937
April, 30

Hindu law—Exclusion from inheritance—Mitakshara—Joint family—Non-congenital leprosy—Supervening disability—Right of survivorship not extinguished—Succession—Fresh stock of descent from him if he becomes sole survivor.

Under the Mitakshara law, if a member of a joint Hindu family, who not being born a leper had acquired an interest in the joint ancestral property by his birth, subsequently becomes afflicted with leprosy of a sanious or virulent type, he does not thereby become completely divested of his previously

*Second Appeal No. 138 of 1934, from a decree of Girish Prasad Mathur, Civil Judge of Muzaffarnagar, dated the 2nd of January, 1934, modifying a decree of Anand, Behari Lal, Munsif of Kairana, dated the 17th of May, 1933.