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and the sessions court on appeal admits him to bail, the court may not necessarily pass a separate order suspending the execution of the sentence or pass an order releasing him on bail under section 426. It may simply pass an order under section 498 admitting him to bail. The necessary result of the release on bail is that the person does not serve out his sentence of imprisonment during the period that he is released on bail. When therefore his appeal is dismissed and he surrenders to his bail, he must serve out the remaining portion of his sentence so as to complete the full period of imprisonment passed against him. It seems to us that the same principle should apply to cases where a person has been bound over for a particular period, is released on bail by the Sessions Judge and has to surrender after the dismissal of his appeal. The necessary result of his being allowed to be at large is that he has for that period neither furnished any security as required by the order of the Magistrate nor been detained in jail, but has been set free by the order of the appellate court. It cannot therefore be said that during this period the order of the Magistrate has been carried out and has therefore partially exhausted itself. We think that on the analogy of the release on bail of persons convicted of offences it must follow that the period during which the person bound over is released on bail by an order of the appellate court should be excluded from the term prescribed under the order of the Magistrate who bound him over.

With these observations we dismiss this application.

### REVISIONAL CIVIL

*Before Mr. Justice Iqbal Ahmad*

MANNI GIR (PLAINTIFF) v. AMAR JATI AND ANOTHER  
 (DEFENDANTS)\*

1935  
 October, 21

*Civil Procedure Code, section 52—Legal representative—Decree against assets of deceased debtor in the hands of a legal representative—Other legal representatives, also having*

*assets, impleaded after limitation—Suit can not be decreed against them nor the assets in their hands touched—No representative capacity—Limitation Act (IX of 1908), section 22.*

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If several persons are in possession of the assets of a deceased person, then each of them is, to the extent to which he is in possession of such assets, a legal representative of the deceased person; and no one of them represents the entire assets or estate of the deceased person. So, if the creditor sues only one of such persons as a legal representative of the deceased debtor, but not in a representative character as being in law competent to represent all the others or the whole estate, and impleads the others after expiry of the period of limitation, no decree can be passed against the entire assets, or affecting the assets in the hands of the defendants who were impleaded beyond time.

Mr. A. P. Pandey, for the applicant.

Mr. S. N. Verma, for the opposite parties.

IQBAL AHMAD, J.:—This is an application in revision against a decree passed by a court of small causes in a suit brought by the plaintiff for the recovery of a sum of Rs.306-8-0 on the basis of a promissory note dated the 16th of August, 1931, executed by one Sheo Narain Jati. Sheo Narain died before the institution of the suit and the plaintiff impleaded one Jadu Nandan Jati as the sole defendant in the suit.

It was alleged in the plaint that the loan was taken by Sheo Narain in the capacity of the mahant of a particular math with a view to defray the expenses of the math, and the plaintiff accordingly prayed for a decree declaring his right to realise the amount due to him from the math property. The learned small cause court Judge however held that the allegation that the debt was taken for the purposes of the math was not proved, and, as such, the plaintiff was not entitled to realise the amount due to him from the math property. This decision of the learned Judge is not assailed before me.

Jadu Nandan Jati contested the suit *inter alia* on the ground that two persons named Amar Jati and Itwar Jati were necessary parties to the suit. The two last named

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persons were then added as defendants, but this was done after the expiry of the period of limitation for the recovery of the amount due on the basis of the promissory note.

Amar Jati and Itwar Jati also contested the suit and the learned Judge dismissed the claim as against them on the ground that they were impleaded as defendants after the expiry of the period of limitation. The claim against Jadu Nandan Jati was decreed; but the decree was confined in its operation to the assets, if any, of Sheo Narain in the hands of Jadu Nandan.

The plaintiff being dissatisfied with the decree of the learned small cause court Judge has come up in revision to this Court and it is contended on his behalf that as Jadu Nandan was in possession of some of the assets of Sheo Narain the court below should have passed a decree against all the three defendants, notwithstanding the fact that two of those defendants were impleaded in the suit after the expiry of the period of limitation. The argument is that as the decree passed in the plaintiff's favour for recovery of the debt due from Sheo Narain could only be realised from the assets of Sheo Narain, and as Jadu Nandan was in possession of some of those assets, he must be deemed to have effectively represented the entire assets left by Sheo Narain, and accordingly the plaintiff was entitled to a decree entitling him to realise the decretal amount from the assets of Sheo Narain, irrespective of the fact whether those assets were or were not in possession of Jadu Nandan. In other words it is argued that the suit was in substance a suit for recovery of the money claimed from the assets of Sheo Narain and was not against any defendant in his personal capacity, and as one of the persons in possession of those assets was sued within the period of limitation, an effective decree executable against the entire assets of Sheo Narain could be and ought to have been passed notwithstanding the fact that some of the defendants were brought upon the record after the expiry of the period of limitation. In

support of these contentions reliance has been placed on the decisions in *Muttyjan v. Ahmed Ally* (1), *Khurshet-bibi v. Keso Vinayek* (2), *Virchand Vajikaranshet v. Kondu* (3) and *Davalava v. Bhimaji Dhondo* (4). In my judgment there is no force in the contentions advanced on behalf of the plaintiff applicant

The decree prayed for by the plaintiff was a simple money decree and the plaintiff's claim could be decreed only against those defendants who were sued before the expiry of the period of limitation. As Amar Jati and Itwar Jati were impleaded as defendants after the period to bring a suit on the basis of a promissory note had expired, no decree could be passed against them. Jadu Nandan was sued as a legal representative of Sheo Narain and not in a representative capacity. The mere fact that Jadu Nandan was impleaded as a defendant within time could not, therefore, warrant the passing of a decree against persons who were not made defendants till the period of limitation for the suit had expired. The plaintiff no doubt was entitled to a simple money decree against the legal representatives of Sheo Narain and to realise that decree from his assets. But if more than one person was in possession of those assets, every one of those persons was, to the extent to which he was in possession of the assets, a legal representative of Sheo Narain. If the plaintiff did not sue some of the legal representatives within the period of limitation, the decree could have no efficacy against them and their possession over the assets could not be disturbed in execution of the decree by which they were not bound. In the case before me the decree no doubt is executable so far as the assets of Sheo Narain in the hands of Jadu Nandan are concerned; but as no decree has been or could be passed against the other two defendants, the assets in their possession cannot be attached and sold in execution of the decree obtained against Jadu Nandan alone.

(1) (1882) I.L.R., 8 Cal., 370.

(2) (1887) I.L.R., 12 Bom., 101.

(3) (1915) I.L.R., 39 Bom., 729.

(4) (1895) I.L.R., 20 Bom., 338.

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The cases relied upon by the learned counsel for the plaintiff applicant are authorities for the proposition that a decree with respect to a debt due from a deceased Muhammadan obtained against only some of his heirs is binding on his other heirs notwithstanding the fact that those other heirs were not impleaded as defendants in the suit. With all respect I am unable to agree with these decisions.

In *Muttyjan v. Ahmed Ally* (1) it was held that when a creditor of a deceased Muhammadan sues the heir in possession, and obtains a decree against the assets of the deceased, the suit is to be looked upon as an administration suit, and those heirs of the deceased who have not been made parties cannot, in the absence of fraud, claim anything but what remains after the debts of the testator have been paid. To the same effect is the decision in *Khurshetbibi v. Keso Vinayek* (2). In these two cases the creditor had obtained a simple money decree against the assets of a deceased Muhammadan only against some of the heirs of the deceased who were in possession of the estate, and the other heirs, who were not in possession, were not impleaded as defendants to the suit.

In *Davalava v. Bhimaji Dhondo* (3) the facts were as follows. One Nur Saheb, a Muhammadan, mortgaged some land to a man named Bhimaji Dhondo. Nur died leaving a widow, a son and two daughters as his heirs. The mortgagee brought a suit against the son "represented by his mother" for possession of the land as owner in pursuance of a certain clause in the mortgage deed and obtained a decree and got possession. Thereafter the daughters brought a suit for redemption of the mortgage, contending that they were not bound by the decree for possession as they were no party to the same. The suit was dismissed and it was held that "When in a mortgage suit the debt is due from the father, and after his death the property is brought to

(1) (1882) I.L.R., 8 Cal., 370.

(2) (1887) I.L.R., 12 Bom., 101.

(3) (1895) I.L.R., 20 Bom., 338.

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sale in execution of a decree against the widow or some of the heirs of the mortgagor, and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they are not bound by the sale simply because they are not parties to the record. This principle of law applies as much to a Hindu family governed by the Mitakshara law as to a Mahomedan family."

In *Virchand Vajikaranshet v. Kondu* (1) a mortgagee under a simple mortgage brought a suit for sale of the mortgaged property after the death of the mortgagor who was a Muhammadan. The mortgagor had left a widow, a son and two daughters as his heirs. But originally only the son was impleaded as a defendant to the suit. On a plea being raised on behalf of the son that the deceased mortgagor had left other heirs, the widow and the two daughters were also brought upon the record as defendants, but this was done after the period of limitation for the suit had expired. Both the trial court and the first appellate court dismissed the claim for sale of the share of the defendants who were added after the expiry of the period of limitation. But a Division Bench of the Bombay High Court decreed the claim of the plaintiff for the sale of the shares of the subsequently added defendants as well. The learned Judges observed that as the suit was properly brought within the period of limitation to enforce payment of money that was specifically charged on the whole mortgaged property, and the property was liable to be sold in satisfaction of the mortgage in priority to the satisfaction of any interest derived from the mortgagor subsequent to the date of the mortgage, the plaintiff was entitled to a decree for the sale of the whole property "in the hands of any heir of the mortgagor" even though some of the heirs were impleaded as defendants after the expiry of the period of limitation.

(1) (1915) I.L.R., 39 Bom., 729.

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The decisions quoted above are based on one or other of the following grounds:

(1) Following the analogy of the Hindu law in the case of a Hindu widow, the defendants in the former suit may be considered as having been sued in their representative character only, and therefore the decision binds the whole property left or mortgaged by the deceased even though only some of his heirs were impleaded as defendants within the period of limitation.

(2) All creditors' suits are in the nature of administration suits, and therefore the heir who is sued effectively represents the other heirs who are not parties to the suit or who are made defendants after the expiry of the period of limitation.

(3) On the death of a deceased mortgagor it is only the equity of redemption that is inherited by the heirs, and as the mortgagee has a lien on the property he can enforce that lien over the whole property, even though some of the heirs who have inherited the equity of redemption are not parties to the suit.

I regret that none of the grounds noted above appears to me sound.

The analogy of a decree obtained against a Hindu widow has no application to a decree obtained only against some of the heirs of a deceased Muhammadan. A Hindu widow in possession of her husband's estate represents the entire estate, and therefore a decree obtained against her without collusion or fraud binds the entire reversioners, for the simple reason that during the continuance of her possession the entire estate vests in her. During her lifetime no reversioner is entitled to possession of the estate. She is during her lifetime the owner of the estate, and therefore the decree obtained against her binds the estate. But under the Muhammadan law each heir inherits a separate and defined share in the estate left by a deceased Muhammadan. One heir has no right or interest in the share inherited by another heir and can in no sense be said to represent

the estate that has devolved on the other heirs. The estate left by a Muhammadan at the time of his death vests immediately in each heir in proportion to the shares ordained by Muhammadan law. It follows that the interests of each Muhammadan heir is distinct and separate and the principle of representation can have no application to such a case. The decree obtained against one heir cannot, therefore, be binding on the share inherited by another heir.

Similarly I am not aware of any principle of law that entitles one of the Muhammadan heirs in possession to stand as a litigant on behalf of all the other heirs, and a suit against only some of the heirs, unless clearly framed as an administration suit, cannot be regarded as such. If one of the heirs takes possession of all the properties left by the deceased, his possession *qua* the shares of the other heirs must be in the capacity of a trespasser, and a decree obtained against a trespasser cannot be binding on the true owner. If a creditor wants to enforce his claim against the share of a particular heir, he must give that heir an opportunity of contesting the validity of his claim, and this can be done only by impleading that heir as a party to the suit. If some of the heirs of a deceased Muhammadan are not impleaded as defendants their shares in the inheritance cannot be adversely affected or be bound by a decree obtained behind their back without giving them an opportunity of contesting the claim. This was the view taken by the majority of the Judges in the Full Bench decision of the Calcutta High Court in *Assamathem Nessa Bibee v. Roy Lutchmeeput Singh* (1).

Similarly the last ground noted above does not in my judgment justify the decisions above referred to. It is true that on the execution of a mortgage the mortgagee's interest vests in the mortgagee and it is only the equity of redemption that is left with the mortgagor, which, on his death, devolves on his heirs, but every mortgagor has a right to redeem the mortgage and this right can only be

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(1) (1878) I.L.R., 4 Cal., 142.



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taken away either after the period for redeeming the mortgage has expired, or an opportunity has been afforded to the owner of the equity of redemption to redeem the mortgage and he has failed to avail himself of the opportunity. A decree for sale obtained behind the back of a mortgagor cannot obviously be binding on him. On the death of a deceased Muhammadan mortgagor the equity of redemption owned by him devolves in specified shares on his heirs, and each heir, to the extent of the share inherited by him in the equity of redemption, occupies the position of a mortgagor. He has, therefore, the right to redeem the mortgage and this right can only be taken away from him if he has been given an opportunity of contesting the validity of the mortgagee's claim. If he is not impleaded as a defendant to the suit on the mortgage within the period of limitation the estate inherited by him cannot be adversely affected by the decree passed in the suit.

For the reasons given above I dismiss this application with costs.

### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Ganga Nath*

ALAM ALI (DEFENDANT) *v.* BENI CHARAN (PLAINTIFF)\*

1935

October, 22

*Transfer of Property Act (IV of 1882), sections 74, 92, 95—Subrogation—Third mortgage executed after first mortgagee's decree—Third mortgagee paying off first mortgagee's decree to which second mortgagee was a party—Rights and powers arising out of such payment—Subrogation to right of priority as against second mortgagee's suit—Fresh charge enforceable within 12 years of the payment—Limitation Act (IX of 1908), article 132.*

*Held (GANGA NATH, J., dissenting) that where a property has been the subject of two simple mortgages and a suit has been brought for sale on the first mortgage and decreed against the second mortgage also; and subsequently a third mortgage*

\*First Appeal No. 479 of 1932, from a decree of Pran Nath Aga, Additional Subordinate Judge of Moradabad, dated the 15th of June, 1932.