

1881
August 29.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight,
Mr. Justice Tyrrell, and Mr. Justice Duthoit.

HAFIZ-UN-NISSA (JUDGMENT-DEBTOR) v. MAHADEO PRASAD AND
ANOTHER (DECREE-HOLDERS).*

Rules prescribed by the Local Government under s. 320 of Act X of 1877 (Civil Procedure Code)—Notification No. 671 of 1880 (Judicial Civil Department) dated the 30th August, 1880—Meaning of “with effect from the 31st October, 1880.”

Held that effect cannot be given to the Rules prescribed by the Local Government under s. 320 of Act X of 1877 (1) unless an order for sale has been made on or after the 1st October 1880.

On the 30th June, 1879, Mahadeo Prasad and Baldeo Prasad obtained a decree against Hafiz-un-nissa Bibi for money secured by the hypothecation of certain land, which directed that the amount of such decree should be recoverable by the sale of such land. On the 18th May, 1880, the decree-holders applied for the attachment and sale of such land in execution of their decree. On the 26th May, 1880, the Court executing the decree (the Subordinate Judge of Azamgarh) ordered that such land should be attached, and it was attached accordingly. On the 17th June, 1880, the Subordinate Judge made an order directing the sale of such land in execution of the decree, and that the sale should take place on the 21st August, 1880, and that proclamations of sale should issue accordingly. On the application of the judgment-debtor the sale was subsequently postponed to the 20th September, 1880. On the 15th September, 1880, the judgment-debtor applied for the postponement of the sale for one month. On the 16th September, 1880, the Subordinate Judge made an order postponing the sale to the 20th November, 1880. On the 13th November, 1880, the judgment-debtor applied to the Subordinate Judge to transfer the execution-proceedings to the Collector, in accordance with the Rules prescribed by the Local Government under s. 320 of Act X of 1877 [Notification No. 671 of 1880, dated the 30th August, 1880 (1)], on the ground that such land was ancestral land. The Subordinate Judge framed on this application the following issue :—“Whether under the Government Notification No. 671,

* First Appeal, No. 22 of 1881, from an order of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 18th November, 1880.

(1) Published at p. 990, *North-Western Provinces and Oudh Gazette*, October, 29th, 1880.

dated the 30th August, 1880, the execution-proceedings should be transferred to the Collector"? Upon this issue the Subordinate Judge held, having regard to the terms of that Notification, and the Rules therein prescribed by the Local Government under s. 320, that the execution-proceedings should not be transferred to the Collector. He so held on the ground that that Notification did not apply to execution-proceedings in which an order had been made for the sale of the property before the 1st October, 1880, from which date that Notification took effect, but only to execution-proceedings in which such an order had been made after that date; and he rejected the judgment-debtor's application.

The judgment-debtor appealed to the High Court, contending that the Subordinate Judge was wrong in holding that the Government Notification related only to decrees executed after the 1st October, 1880. The Division Bench before which the appeal came for hearing (STRAIGHT, J., and DUTHOIT, J.,) referred to the Full Bench the question raised by the appeal, the order of reference being as follows :—

ORDER OF REFERENCE.—The question raised by this appeal is one of considerable importance, and as many cases are likely to come in appeal to this Court with reference to the construction to be placed upon the preamble to the Notification of Government of the 30th August, 1880, No. 671, we think it better to refer the point to the Full Bench for determination.

Munshi *Kashi Prasad*, for the appellant.

The *Senior Government Pleader* (*Lala Jualā Prasad*), for the respondents.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—As I understand the Notification No. 671 of 1880, and dated the 30th of August, 1880, the date of the decree itself need not be considered; it is the date of the order for sale which is material for determining the question whether the Notification does or does not apply to the particular case; and if such order for sale has been made before the 1st October, 1880, then the Notification does not apply, and the execution of the decree

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must not be transferred to the Collector, but must abide the usual course of law. In the present case the procedure that had taken place is very loosely and inartificially stated in the judgment of the Subordinate Judge, and it is difficult to understand the dates and sequence of the various proceedings to which he refers. But I have looked into the record, and I find that the question in the case before us may be thus simply stated. The date of the decree is the 30th June, 1879, and on the 18th May, 1880, the decree-holder applied for its execution, and on this application an order for execution was made on the 26th May, 1880, and the property was attached. On the 17th June, 1880, an order for sale was made, the first day subsequently fixed for sale being the 21st August, 1880, but on the application of the judgment-debtor the sale was delayed till the 20th September, 1880. On the 15th of the same month of September, that is five days before the sale was to have taken place, the judgment-debtor again applied that the sale might be further adjourned, and upon this application an order was made, dated the following day, the 16th September, the effect of which was to stay the execution until the 20th of the following November. But about a week before that last date, that is, on the 13th November, 1880, the debtor presented an application to the Subordinate Judge, praying that, pursuant to s. 320 of the Procedure Code and the Government Notification, the execution-proceedings might be transferred to the Collector. The Subordinate Judge was of opinion that the order of the 16th September was the proper date to be considered, and as that was anterior to the 1st October named in the Notification, the judgment-debtor's application did not come within its terms, and he therefore refused the application.

But the Subordinate Judge was clearly mistaken in fixing the 16th September as the date to be looked to, for that was merely the date of an order staying the execution of the decree, the one material date being the 17th June, 1880, on which the order for sale was actually made. The Notification therefore pursuant to s. 320 of the Procedure Code does not apply to such a case: and although the Subordinate Judge was wrong in fixing on the 16th September as the date to be considered, his order refusing the application was right.

STRAIGHT, J., and DUTHOIT, J.—The question before us appears to be the following:—At what stage of proceedings, taken against immoveable property in execution of a Civil Court decree, which were commenced before the 1st October, 1880, must effect be given to the Rules issued by the Lieutenant-Governor, North-Western Provinces, with the sanction of the Governor-General in Council, in pursuance of the powers conferred by s. 320 of the Code of Civil Procedure, or in other words, what sense, as regards such proceedings, is to be given to the words “with effect from the 1st October, 1880” contained in the preamble of the Rules? On consideration of the terms of cl. 1, s. 320 of the Code of Civil Procedure, and of those of the preamble and of paragraphs 1 and 2 of the Notification of Government, No. 671, dated the 30th August, 1880, we do not think there can be any doubt that the fact of an order for sale having or not having been passed before the 1st October, 1880, is the fact which governs the operation or non-operation of the rules as regards the particular case of execution of decree.

TYRRELL, J.—The preamble of the Notification No. 671 of 1880 defines and restricts its scope and operation to the execution of such cases only as have effect on *ancestral* land, the sale of which has been ordered by a Civil Court under circumstances stated in the Notification. The question, then, to be determined by the Civil Courts in such cases is, whether the land which they have ordered to be sold is or is not “ancestral land” in the sense of the Notification. The first “rule” prescribed by the Local Government under s. 320 of Act X of 1877, for giving effect to the declaration and objects of the Notification, provides for two steps in procedure in this direction: namely, the time when the Court is to determine the issue of the ancestral or non-ancestral nature of the land (*a*): and what would be the result of a determination that the land is ancestral (*b*). The time or stage for determining the nature of the land is when the Civil Courts have passed orders for the sale: “Every Civil Court on passing orders for the sale of any land shall ascertain from the judgment-debtor whether it is ancestral land, and after hearing any objection made by the decree-holder shall, if satisfied that it is ancestral land,” deal with it as land to be

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treated by the Collector under the Notification. The second rule proceeds to provide that "when a Civil Court *has ordered* any immoveable property of an ancestral character to be sold," it shall transmit to the Collector certain documents, &c., &c. From these two rules it seem to me that the question of the operation or operativeness of the Notification No. 671 of 1880 comes for the first time before a Civil Court executing a decree when it has passed an order for selling immoveable estate. The Notification would therefore be properly applied to all cases of execution of decrees by such Courts wherein the order for sale comes into existence on or after the 1st October, 1880. But when orders for sale had been passed prior to that date, it seems to me that rules and procedure which are to be applied *pari passu* with and in immediate sequence to such orders for sale, but which had not come into existence, or rather were not operative, till a date subsequent to the date of the order for sale, could not rightly be applied retrospectively to such orders.

PRIVY COUNCIL.

P. C.
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June 16 & 17.

UJAGAR SINGH (PLAINTIFF) v. PITAM SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court of the North-Western Provinces at Allahabad.]

Mitakshara law—Inheritance of share in village—Interest of son acquired on birth.

A mauza, of which the proprietary right formerly belonged to one zamindar, the ancestor of the plaintiff, was sold, whilst in the possession of the generation succeeding him, for arrears of revenue, and became the property of the Government by purchase. The Government, before the birth of the plaintiff, restored it in four equal shares to the family of the old proprietors, then consisting of four members, one being the plaintiff's father, who thus obtained possession of a five biswas share. *Held* that, whatever interest the plaintiff, as son, might have under the Mitakshara law, in ancestral property, it could not be said that, at the time of his birth, there was any proportionate share in the mauza in which he could, by birth, acquire an interest, except this five biswas share.

In this suit the plaintiff sought to have set aside, so far as it affected him, a decree, to which his father had consented, declaring his father's right to a five biswas share only. *Held* that, even supposing that the father (who was living) might have some right in him to procure an alteration of the grant, such a right was not one in which a son would by his birth acquire an interest.

* Present: SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.