

hypothecation of the joint family property for the purposes of securing a debt cannot be enforced against the joint family property unless it can be shown in some manner that the hypothecation was for legal necessity or for antecedent debt. In the present case it is not alleged that any such circumstances were present. We therefore hold that the hypothecation of the family property by Mathura Dat was invalid and cannot be enforced against the respondent.

The appeal fails and is dismissed with costs to the respondent.

Appeal dismissed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice Ziaul Hasan*

GUR PRASAD AND OTHERS (OBJECTORS-APPELLANTS) v. BABU
UDAI BHAN PRATAP SINGH (DECREE-HOLDER-
RESPONDENT)*

1935
July 17

Oudh Rent Act (XXII of 1886), section 154(2)—Civil Procedure Code (Act V of 1908), order XXI, rule 16—Decree for arrears of rent against under-proprietors executable jointly and severally—Some judgment-debtors selling their rights and interests to decree-holder—Decree-holder, whether can execute entire decree against remaining judgment-debtors—Decree-holder, if bound to give credit for proportionate amount of decree after his purchase—Civil Procedure Code (Act V of 1908), order XXI, rule 16, applicability of.

Where a proprietor obtains a decree for arrears of rent against the whole body of under-proprietors, executable jointly and severally against them, and pending execution of the decree, some of the judgment-debtors sell their entire rights and interests to the decree-holder to liquidate all their debts, *held*, that while the decree-holder cannot be deprived of his right to execute the decree by reason of his purchase of a share in the under-proprietary tenure it would be only just and equit-

*Execution of Decree Appeal No. 70 of 1933, against the order of M. Mohammad Abdul Haq, District Judge of Fyzabad, dated the 22nd of November, 1933, upholding the order of M. W. Abbasi, I.C.S., Assistant Collector, 1st Class, Fyzabad, dated the 30th of September, 1933.

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able that he should be required to give credit for the amount of the decree for which he has become liable by his purchase under section 154 of the Oudh Rent Act. He cannot be allowed to execute the entire decree against the remaining judgment-debtors on the ground that they can seek their remedy by a suit for contribution. *Sarooj Chunder Hazrah v. Troylokhonath Roy* (1), referred to.

The second proviso to Order XXI, rule 16, C. P. C., has no application to the case where the decree-holder acquires a share in the estate of one of the judgment-debtors. In that case the decree-holder is, on general principle of equity, bound to give credit for a proportionate amount of the decree. *Asie Bibi v. Malik Aziz Ahmad* (2), referred to.

Messrs. *Hyder Husain* and *Ali Zaheer*, for the appellants.

Messrs. *M. Wasim* and *Khaliq-uz-zaman*, for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is a judgment-debtors' appeal against the order, dated the 22nd of November, 1933, of the learned District Judge of Fyzabad upholding the order, dated the 30th of September, 1933, of an Assistant Collector of that district.

The facts of the case are that on the 18th of September, 1929, the respondent, who is the taluqdar of Bhati in the Fyzabad district, obtained a decree for arrears of rent under section 108(2) of the Oudh Rent Act against the whole body of underproprietors. The decree provided that the arrears were to be realised in the first place from the defaulter concerned and in case it could not be realised from him then from the other judgment-debtors. The decree-holder was dissatisfied with this limitation imposed on his right to execute the decree and on an appeal made by him the appellate Court on the 16th of February, 1931, cancelled the said limitation and gave the decree-holder the right to execute the decree jointly and severally against all the judgment-debtors. In the meantime by a sale deed, dated the 19th of September, 1929, the decree-holder taluqdar

(1) (1868) 9 W.R., 230(231).

(2) (1931) I.L.R., 54 All., 448.

purchased the entire rights and interests of some of the judgment-debtors amounting to an eight annas share in the under-proprietary tenure with respect to the rent of which he had obtained the aforesaid decree.

The decree-holder put into execution his entire decree against three of the judgment-debtors other than his vendors. On the 3rd of July, 1933, these three persons who are now the appellants before us made an objection to the effect that the decree-holder having taken a transfer of an eight annas share of the under-proprietary tenure the decree should be deemed to have been satisfied. This objection has been overruled by both the lower Courts. The learned District Judge has based his decision mainly on the ruling of the Allahabad High Court in *Asia Bibi v. Malik Aziz Ahmad* (1). It was pointed out in that case that the second proviso to order XXI, rule 16 lays down that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. But this provision has no application to the converse case where the decree-holder acquires a share in the estate of one of the judgment-debtors. We are in entire agreement with the view just stated. It should, however, be pointed out that in that case it was ultimately held that inasmuch as part of the assets of the original judgment-debtor had vested in the decree-holder by operation of law she was bound to give credit for a proportionate amount of the decree and accordingly the amount had to be deduced *pro tanto*.

Section 154(2) of the Oudh Rent Act provides that in a case like the present where under-proprietors have transferred their rights in the land, "the transferee shall, subject to any agreement in writing with the proprietor to the contrary, be liable to pay to the proprietor any arrears of rent due in respect of the land at the date of the transfer." We have examined the sale deed dated

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the 19th of September, 1929, obtained by the respondent in his favour. It does not contain any agreement to the contrary. In fact on the other hand it shows that the object of the vendors was to liquidate all their existing debts though the decree, dated the 18th of September, 1929, was not specifically mentioned. It seems therefore clear that under the provisions of section 154 the respondent by obtaining a sale of the under-proprietary rights in his favour became liable for such portion of the decretal amount as represented the arrears of rent due at the date of the transfer in respect of the share which formed the subject of the sale. He ought therefore on general principles of equity to give credit for a proportionate amount of the decree. It has been strongly contended by the learned counsel for the respondent that the liability of the judgment-debtors being joint and several the decree-holder has the right to enforce the whole decree against the appellants. It has further been argued that in case the appellants have any right to make the respondent liable for a half share of the decretal debt they can seek their remedy by a suit for contribution. The following observations of PEACOCK, C.J., in the Full Bench case of the Calcutta High Court in *Sarooop Chunder Hazrah v. Troylokhonath Roy* (1), may be usefully quoted in this connection:

“It is said, if you do not allow the plaintiff to execute this decree, you will put him to all the inconvenience of instituting a regular suit for contribution. But suppose you do allow him to execute it, you will force the defendants to sue for contribution. It appears to me that that certainly would be a very inconvenient course, and would lead to a multiplicity of actions, which the law abhors.”

“It appears to me, upon the general principles of equity, that the debtor in this case, having taken assignment of the judgment, was not entitled to enforce it by execution against his co-debtors.”

(1) (1868) 9 W.R., 230(234).

We are therefore of opinion that while the Courts below are right in holding that the decree-holder cannot be deprived of his right to execute the decree by reason of his purchase of the eight annas share in the under-proprietary tenure it would be only just and equitable that the decree-holder should be required to give credit for half of the amount of the decree for which he has become liable under section 154 of the Oudh Rent Act. The amount for which execution is sought should therefore be reduced by half.

The result is that we allow the appeal in part and modify the decree of the lower appellate court by directing that the execution should be proceeded with only in regard to half of the decretal amount. In the circumstances we direct that the parties should bear their own costs.

Appeal partly allowed.

REVISIONAL CIVIL

*Before Sir C. M. King, Kt., Chief Judge and
Mr. Justice H. G. Smith*

MOHAMMAD YASIN KHAN (PLAINTIFF-APPLICANT) v. MUMSAMMAT HANSA BIBI AND OTHERS (DEFENDANTS-OPPOSITE-PARTY)*

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Civil Procedure Code (Act V of 1908), sections 115, 151 and 152—Limitation Act (IX of 1908), section 5—Judgment and decree not in accordance with intention of Court—Application for amendment made after expiry of limitation for appeal—Amendment, whether can be allowed—Time for filing of appeal, if can be extended—Revision against order regarding amendment—Jurisdiction of High Court to interfere in revision.

Where the operative portion of a judgment and of the decree is not in accordance with the intention of the Court, an application for their amendment should be allowed even after the period for filing the appeal against the decree has expired, as

*Section 115 Application No. 8 of 1934, against the order of Shaikh Mohammad Tufail Ahmad, Munsif of Utraula, district Gonda, dated the 12th of November, 1933.