

1937

S. TAUQUI  
HUSAIN  
v.  
S. MO-  
HAMMAD  
AKHTAR

Srivastava,  
C.J.  
and  
Madgley, J.

him the right to proceed in accordance with that rule. Instead of doing this he proceeded straightway to execute Rangubai's decree as if he was the proprietor of it and this he could not do as there was no assignment of the decree in writing in his favour, nor, in my opinion, was he a transferee by operation of law. In my opinion, therefore, the respondent had no *locus standi* to apply in execution of Rangubai's decree, and the Court had no jurisdiction to order execution to issue in his favour."

We are in agreement with the view expressed in the cases cited above. We think that Muhammad Akhtar cannot be regarded as a transferee of the decree by operation of law by his merely obtaining a decree against Syed Nazim Husain entitling him to a certain share in the decretal amount. We accordingly allow the application with costs, set aside the order of the lower court and dismiss the application of Musammam Akhtar under order XXI, rule 16 of the Code of Civil Procedure.

*Appeal allowed.*

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge  
and Mr. Justice H. G. Smith*

1937  
August, 20

BENI RAM AND OTHERS (DEFENDANTS-APPELLANTS) v. RANI  
D. R. KUNWAR AND ANOTHER (PLAINTIFFS-RESPONDENTS)\*

*Oudh Rent Act (XXII of 1886), section 154(1)—Civil Procedure Code (Act V of 1908), section 146—Mortgage with possession of under-proprietary rights—Mortgagee entering into possession—Suit for under-proprietary rent against mortgagor and mortgagee—Mortgagee discharged—Claim decreed against mortgagor alone—Execution of decree against mortgagee or his representative—Mortgagee, if a "person claiming under mortgagor" within section 146, Civil Procedure Code—Mortgagee, if liable under section 154(1), Oudh Rent Act.*

An under-proprietor made a mortgage of his under-proprietary rights in 1913 and the mortgagee entered into possession in

\*Execution of Decree Appeal no. 25 of 1935, against the order of R. F. S. Baylis Esq., i. c. s., District Judge of Bara Banki, dated the 8th of December, 1934, modifying the order of Syed Najmul Hasan, Assistant Collector, First Class of Bara Banki, dated the 11th of May, 1934.

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1916. Thereafter the mortgagee obtained a decree for sale on the basis of the mortgage and in execution of his decree himself purchased the mortgaged property. Afterwards in 1926, the superior proprietors instituted a suit for arrears of under-proprietary rent for 1923-24. The claim was decreed against the mortgagor and the mortgagees who were also impleaded in the suit were discharged. The superior proprietor then applied for execution of the decree against the mortgagees on the ground that they were liable for the arrears under section 154(1) of the Oudh Rent Act and should be considered to be "persons claiming under the mortgagor" for the purposes of section 146 of the Code of Civil Procedure.

*Held*, that section 146 of the Code of Civil Procedure contemplates a change of title after the decree, and has no application to the case in which the transfer was made before the rent became due, and the decree-holder cannot enforce his rights under section 154(1), Oudh Rent Act by execution of the decree against the mortgagees or their representatives. *Bisheshar Dayal v. Bajrang Bahadur Singh* (1), distinguished. *Bishunath Saran Singh, Lt. Raja Bahadur v. Ghanshyam Dass* (2), *Seshappaya v. Venkataramana Upadya* (3), and *Dost Mohammad v. Altaf Husain Khan* (4), referred to.

Messrs. *R. B. Lal* and *M. M. Lal*, for the appellants.

*Mr. M. Wasim*, for the respondents.

SRIVASTAVA, C. J. and SMITH, J.:—In 1913 Sitla Bakhsh, who was an under-proprietor of an 8 annas share in village Marauli, made a mortgage of the aforesaid 8 annas share together with certain other lands in favour of Mahabali, father of appellants 1 and 2. The mortgagee subsequently obtained a decree for mortgagee possession, and got possession of the 8 annas under-proprietary share about the end of June, 1916. Thereafter the mortgagee obtained a decree for sale on the basis of the mortgage. In execution of this decree the 8 annas share of Marauli was sold and purchased by the mortgagee on 20th May, 1924. This sale was confirmed on 3rd July, 1924. On 20th June, 1926, the plaintiffs, who are the superior proprietors, instituted a suit for arrears of under-proprietary rent for 1931.

(1) (1929) 6 O.W.N., 469.

(2) (1935) O. W. N., 1229.

(3) (1910) I.L.R., 33 Mad., 459.

(4) (1912) 17 I.C., 512.

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Fasli. The claim was decreed against Sitla Bakhsh on 23rd September, 1926. Appellants 1 and 2, who were also impleaded in the suit, were discharged. On 20th March, 1934, an application for execution was made by the plaintiffs-decree-holders against appellants 1 and 2 and Ram Kishore, appellant no. 3, who is a nephew of Mahabali, and is said to have constituted a member of a joint Hindu family with his uncle. The application was opposed on several grounds. The learned Assistant Collector held that the decree-holders were not entitled to execute the decree against any of the representatives of Mahabali. He accordingly dismissed it. On appeal the learned District Judge of Bara Banki held that, under section 154 of the Oudh Rent Act read with section 146 of the Code of Civil Procedure, the representatives of Mahabali were liable to the superior proprietor for the arrears of rent which formed the subject of the decree, and that payment of it can be enforced in execution. He also disallowed the contention about the application for execution being barred by limitation. Dissatisfied with this order, the two sons and the nephew of Mahabali have come to this Court in appeal. We are of opinion that the appeal must succeed.

Section 154 of the Oudh Rent Act makes provision for the superior proprietor's lien for rent payable by under-proprietors. Sub-section (1) of this section provides that when an under-proprietor creates any incumbrance, the incumbrancer is liable to the proprietor for rent accruing in respect of the land subject to the incumbrance subsequent to its creation. Sub-section (2) of the section similarly provides that where an under-proprietor makes a transfer of his interest and the transferee enters into possession, the transferee is liable to pay to the proprietor any arrears of rent due in respect of the land at the date of the transfer. The learned counsel for the appellants has relied on the decision of a Bench of this Court in *Bishunath Saran*

*Singh, Lt. Raja Bahadur v. Ghanshyam Dass* (1) in support of his contention that sub-section (2) applies only to cases of voluntary transfers, and has no application to the case of an auction-purchaser. Mr. Wasim, counsel for the decree-holders, questions the correctness of this ruling, and contends that a transferee under an involuntary transfer should be liable just as much as a transferee under a voluntary transfer. The contention appears to us to be not without force, but it does not appear to us necessary to decide the question in the present appeal because, in any case, there can be no doubt about the application of sub-section (1). The incumbrance was created in 1913. The mortgagee also entered into possession in June 1916, and the arrears of rent in question fell due long after in 1923-1924. The only answer made by the learned counsel for the appellants with regard to sub-section (1) was that the application of that sub-section should be confined to incumbrancers with possession. Assuming, but not admitting this to be so, as already pointed out, the incumbrancer in the present case had obtained possession several years before the arrears of rent in dispute became due.

The next question is whether the decree-holders can enforce their rights under section 154 of the Oudh Rent Act against the appellants in the execution proceedings. The determination of this question rests on the interpretation of the provisions of section 146 of the Code of Civil Procedure. This section provides that an application which can be made against a person may be made "against any person claiming under him". The respondents' argument is that they could undoubtedly apply for execution against Sitla Bakhsh. This being so, it is argued that they can apply for execution also against Mahabali, and for the matter of that against his representatives, the appellants, because Mahabali must be regarded as a person claiming under

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Sitla Bakhsh. It has been frankly conceded by Mr. Wasim that unless Mahabali is regarded as a person claiming under Sitla Bakhsh so as to make section 146 applicable, he cannot refer to any other provision of law entitling him to enforce execution against the appellants. The general rule has been stated in Bigelow on Estoppel (5th Edition, page 142) in the following words:

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“To make a man privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance or succession or purchase from a party subsequently to the action, or he must hold property sub-ordinately.”

This principle was accepted by the Madras High Court in *Seshappaya v. Venkatramana Upadya and another* (1), in which with reference to the meaning of the words “persons claiming under” used in section 13 of the Code of Civil Procedure (Act XIV of 1882), it was held that a party represents all interests owned by him at the time of the action as also interests belonging to others which are subordinate to his, and therefore a decision against him will bind interests acquired from him subsequently, and all subordinate interests represented by him whensoever acquired. It is not suggested that Mahabali held a subordinate interest under Sitla Bakhsh. Admittedly he acquired his mortgagee rights in the property in respect of which the decree for arrears of rent was passed long before the arrears of rent in question became due, and also long before the institution of the suit in which the decree was passed. *Dost Mohammad v. Altaf Husain Khan and others* (2) is a case directly in point. The head-note of this case is as follows:

“M sued for the recovery of some immovable property. By a compromise, M was awarded a portion of the property. Before a decree could be passed in terms of the compromise, M transferred his interest in the property to A. A did not apply to bring himself on the record. After the decree was passed A applied to execute the decree as representative of M.

(1) (1910) I.L.R., 33 Mad., 459.

(2) (1912) 17 I.C., 512.

*Held*, that he was not a representative within the meaning of section 146 of the Code of Civil Procedure and, as his name was not on the record, he could not execute the decree."

It was argued by Mr. Wasim that although ordinarily a person claiming under a party to a litigation is one who derives his title subsequent to the cause of action, yet in a case like the present where a liability arises under the law, the person so made liable should be considered to be "a person claiming under" for the purpose of section 146 of the Code of Civil Procedure. We regret we cannot accede to this argument. The words "any person claiming under him" as used in the section must be interpreted in such a way that the interpretation could hold good in all cases. If the contention of Mr. Wasim is to be accepted, there can be no reason why the same interpretation should not be made and the decree passed by a civil court against a judgment-debtor should not be executed against his transferees who acquired title under transfers made before the commencement of the litigation. We are, therefore, clearly of opinion that section 146 of the Code of Civil Procedure contemplates a change of title after the decree, and has no application to a case like the present in which the transfer was made before the rent became due.

We were also referred to the decision of a Bench of this Court in *Bisheshar Dayal v. Rai Bajrang Bahadur Singh and others* (1), in which it was held that by the combined effect of section 154 of the Oudh Rent Act and 146 of the Code of Civil Procedure, an auction-purchaser of an under-proprietary tenure in execution of a decree for sale on the basis of a mortgage of the tenure is liable to satisfy a decree for arrears of rent obtained against the original under-proprietor. This case does not help the respondents because, as remarked at pages 470 to 471 of the report, the decree in that case had been obtained long before the auction-sale. It

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might also be noted that the case appears to have been decided on the basis of sub-section (2) of section 154, dealing with the case of purchasers, and not on the basis of sub-section (1) relating to incumbrances.

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We are, therefore, of opinion that section 146, Civil Procedure Code, does not apply to the case, and the decree-holders cannot enforce execution of the decree against the appellants. In this view of the matter, it is not necessary for us to decide the other contentions of the appellants about limitation and *res judicata*.

The result, therefore, is that we allow the appeal, set aside the decree of the lower court, and dismiss the application for execution. The appellants will get their costs in all the courts from the respondents.

*Appeal allowed.*

## REVISIONAL CIVIL

Before Mr. Justice H. G. Smith and Mr. Justice  
W. Y. Madeley

1937  
August, 17

MUSAMMAT SUNDAR BAHU (APPLICANT) v. MUSAMMAT  
MOHAN DEI AND OTHERS (OPPOSITE PARTY)\*

*Civil Procedure Code (Act V of 1908), order XXXIII, rule 5(d) and section 115—Pauper suit—Application to sue in forma pauperis rejected—Revision against the order rejecting application to sue as pauper, if lies—Cause of action implies subsisting cause of action—Cause of action for suit extinguished by limitation—Application for permission to sue as pauper, if should be rejected.*

A revision lies against an order dismissing an application for permission to institute a suit in *forma pauperis*. *Asa Ram v. Genda* (1), and *Sumitra Devi v. Hazari Lal* (2), followed. *Muhammad Ismail v. Karam Ali* (3), and *Mahadeo Sahai v. Secretary of State for India in Council* (4), not followed.

Order XXXIII, rule 5(d) of the Code of Civil Procedure contemplates a subsisting cause of action, and if the law of limitation has come into operation and barred the suit, the

\*Section 115 Application no. 138 of 1936, against the order of Saiyed Qadir Hasan, Civil Judge of Sitapur, dated the 28th of March, 1936.

(1) (1934) I.L.R., 10 Luck., 265.

(2) (1930) I.L.R., 52 All., 927.

(3) (1924) 1 O.W.N., 311.

(4) (1921) I.L.R., 44 All., 248.