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his absence the question of the application of section 537 does not arise.

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The result is that the conviction and sentence passed upon Abdul Hamid will be set aside and the case will be remanded to the Subdivisional Magistrate

MULLICK, J. of Araria for a *de novo* trial.

The petitioner will surrender before the District Magistrate when called upon to do so.

BUCKNILL, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Mullick and Bucknill, J.J.

SIA SHACHARI PEARI

v.

RAM KISHORI KUER.*

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June, 8.

Maintenance, decree for—specific properties charged—charged properties exhausted—whether decree executable against other properties—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 6—Transfer of Property Act, 1882 (Act IV of 1882), section 39

Where maintenance is awarded to a Hindu widow by a decree which charges specific property for the payment of it, the decree may be executed as a simple money decree, and when the property so charged is exhausted the decree-holder is entitled to execute the decree against other properties of the judgment-debtor, provided these properties belonged to the widow's husband, without making an application under Order XXXIV, rule 6, Code of Civil Procedure.

Ashutosh Banerjee v. Lukhimoní Debya(1), followed.

Appeal by the judgment-debtor.

These two appeals arose out of the execution of a decree, dated the 8th March, 1911, passed by the

* Appeals from Original Orders Nos. 176 and 185 of 1922, from an order of A. N. Mitter, Esq., Additional District Judge of Darbhanga, dated the 26th May, 1922.

(1) (1892) I. L. R. 19 Cal. 130, F.B.

Additional Subordinate Judge of Darbhanga, in suit No. 21 of 1910. By that decree the respondent, Mussammat Ram Kishori Kuer, was allowed maintenance at the rate of Rs. 50 per month, payable in two equal instalments annually for the duration of her life. The Court directed that the amount of maintenance, then in arrear as well as future maintenance, was to be realized as a charge on certain immovable properties mentioned in the plaint in the possession of the judgment-debtors who were members of the family of Rajballav, the deceased husband of Mussammat Ram Kishori, and had succeeded to Rajballav's property. The first execution taken out in 1914 realized a sum of about Rs. 9,000 by the sale of the properties charged. There were two other executions in 1917 and 1919. The present execution case was filed on the 25th November 1921, for a sum of Rs. 5,587 on account of principal (amounting to Rs. 3,300) and interest. The decree-holder prayed that, as the judgment-debtor, Sia Shachari, had in her possession some property belonging to the estate of her deceased husband, she was entitled to recover the judgment debt by the sale of that property. She also prayed that, as the remaining judgment-debtors had realized a decree in which her husband was interested, she was entitled to the proportionate share of her husband in the amount realized in the execution of that decree and she also contended that, as some of the judgment-debtors had sold portions of a *mauza* named Keotgavan in which her husband had an interest, she was entitled to recover from the vendors the value of her husband's interest in the portions sold. Objections were thereupon made by Sia Shachari and two other judgment-debtors. The objections of these two were dismissed, but Sia Shachari's objection was partially allowed by a judgment passed by Mr. A. N. Mitter, Additional District Judge, dated the 26th May, 1922. The learned Judge held that a 7-annas 2-*gandas* share of Keotgavan, belonging to the estate of Rajballav, was in the possession of Sia Shachari and that it was

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liable for sale in satisfaction of the decree-holder's claim.

With regard to the decree-holder's claim against Sia Shachari, in respect of her husband's share in the proceeds of the mortgage decree above referred to, the learned Judge held that the money had been realized by Sia Shachari's mother-in-law, Ramsahaon, and that there was no evidence to show that any part of it had come into Sia Shachari's hands. He, therefore, dismissed the decree-holder's claim for that portion.

Sia Shachari preferred appeal No. 170 of 1922 against the decision in regard to the sale of 7-annas 2-gandas of village Keotgavan.

Janak Kishore, for the appellant.

Noresh Chandra Sinha and *Sunder Lal*, for the respondent.

MULLICK, J. (after stating the facts of the case, as set out above, proceeded as follows):—

The first objection taken is that the decree as it stands cannot be executed. It is contended that the decree is a mortgage decree and, as the properties charged have already been exhausted, the only remedy open to the decree-holder is to take out an order under rule 6 of Order XXXIV. It is contended that the decree, being a mortgage decree, it cannot be executed as a personal decree against the judgment-debtor. Now it is quite clear on the authority of *Ashutosh Banarjee v. Lukhimoni Debya*⁽¹⁾ that it is not necessary for the decree-holder to bring a fresh suit for maintenance. In the decree of the 8th March, 1911, there was not merely a declaration of the right to maintenance but also a direction that the arrears of maintenance payable at certain dates were to be realized from the judgment-debtors and the Court decided that the arrears were to be charged upon certain properties. Now that was a decree enuring for the duration of the decree-holder's life and it is open to

(1) (1892) I. L. R. 19 Cal. 139, F.R.

her to execute her present claim for arrears of maintenance without bringing a fresh suit.

As for the contention that, being a mortgage decree it cannot be executed as a simple money decree, the argument proceeds on a fallacy. The decree is clearly not a mortgage decree. The mode of execution is partially that provided for the execution of mortgage decrees, but the charge in this case was a lien not antecedent to the decree but created by the decree itself and therefore it cannot be said that there was any mortgage on the property or that the decree is a true mortgage decree. In my opinion, the decree-holder can, at any time after the mortgage properties are exhausted, proceed to execute the decree against the properties which belonged to her husband and are in the possession of the judgment-debtor. In effect an application, under Order XXXIV, rule 6, would not be materially different from the application which has been made in the present case. In either event the decree-holder would be entitled to proceed against the other properties of the judgment-debtors, provided those properties belonged to the estate of her deceased husband. The difference between the maintenance right of a Hindu widow and a mortgage charge has been recognized in section 39 of the Transfer of Property Act and ordinarily it is enforceable like any other liability in respect of which no charge exists. A Court may decree that the liability shall be enforced as a charge but, in my opinion, the law does not say the procedure of the execution of the decree is limited to the provision of Order XXXIV. Therefore the objection that the execution cannot proceed is, in my opinion, untenable.

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Then comes the question as to the merits. Now, with regard to Sia Shachari, it is established that she is in possession of a 7-annas 2-gandas share of *mauza* Keotgavan which share was the property of Rajballav. It is true that this property was not included in the properties specified in the decree of the 8th March,

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1911, as being liable to the decree-holder's charge: but as under the Hindu Law a widow is entitled to proceed against all the properties of her deceased husband, to recover her maintenance allowance, there can be no objection to the order which has been made in this case. The result is that the judgment of the learned Additional District Judge is affirmed and appeal No. 170 of 1922 is dismissed with costs.

BUCKNILL, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mullick and Bucknill, J.J.

MUSSAMMAT BIBI ZAINUB

v.

PARAS NATH.*

1923.

June, 15.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 89 and 92(2), section 115—Execution sale, application to set aside, deposit—limitation—auction-purchaser, whether is a necessary party—Revision.

An application under Order XXI, rule 89, to set aside a sale on deposit of the decretal amount and compensation is within time if the deposit is made within 30 days from the date of the sale even though notice of the application is not served on all the parties affected by the sale until after the expiry of that period.

Ganesh Bab Naik v. Vithal Veman Mahalya(1), applied.

Mussammatt Sumitra Kuer v. Damri Lal(2) and *Ajiuddin Ahmed v. Khoda Bux Khondkar*(3), not followed.

Query.—Whether an application to make the auction-purchaser a party to a proceeding under Order XXI, rule 89, is required.

* Civil Revision No. 86 of 1923, from an order of Damodar Prasad, Esq., Officiating Additional District Judge, Patna, dated the 31st January, 1923, reversing an order of Babu Krishna Sahai, Subordinate Judge, Patna, dated the 10th May, 1922.

(1) (1913) I. L. R. 37 Bom. 387 (2) (1921) 2 Pat. L. T. 336.

(3) (1919) 50 Ind. Cas. 5.