APPELLATE CIVIL.

1939.

April, 17.

Before Dhavle and Rowland, JJ.

BHUBNESHWAR PRASAD NARAIN SINGH

v.

KHEMCHANDRA.*

Hindu Law—decree against a member of joint Hindu family—execution—family property attached and ordered to be sold—death of judgment-debtor before sale—effect—judgment-debtor's share at the time of death, whether liable to be sold.

Where in execution of a money decree against a member of a joint Hindu family, the property of the joint family had been attached and ordered to be sold, and thereafter the judgment-debtor died and the sale was objected to by the other co-parceners on the ground that the attachment of the property in the life-time of the judgment-debtor ceased to be of any effect on his death and that they took the whole of the property attached by survivorship:

Held, (*i*) that the execution proceedings had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the property to the extent of the judgment-debtor's undivided share and interest therein which could not be defeated by his death before the actual sale.

Suraj Bunsi Koer v. *Sheo Prasad Singh*(1) and *Faqir Chand* v. *Sant Lal*(2), followed.

(*ii*) that the decree-holder was entitled to proceed against what would have been the judgment-debtor's share at the time of his death, and that any subsequent happenings could not, in view of the attachment and the death, either increase or reduce that share.

Appeal by the judgment-debtors.

The facts of the case material to this report are set out in the judgment of the Court.

L. K. Jha and *R. Chaudhury*, for the appellants.

*Appeal from Original Order no. 260 of 1938, from an order of Babu Gobind Saran, Subordinate Judge at Motihari, dated the 14th May, 1938.

(1) (1878) I. L. R. 5 Cal. 148, P. C.
(2) (1925) I. L. R. 48 All. 4.

1939.

BHUBNESHWAR PRASAD NARAIN SINGH v. KHEMCHANDRA.

B. N. Mitter (with him *Ajit Kumar Mitter* and *K. P. Upadhaya*), for the respondents.

DHAVLE AND ROWLAND, JJ.—We do not think that there is any substance in this appeal. It arises out of a proceeding in execution of a decree, which was passed against Lachmi Prasad Narain Singh on compromise after his son and two grand-sons, who had originally been impleaded as defendants 2 to 4 and had put in written statements challenging the debt of Lachmi Prasad Narain Singh as immoral and not binding upon them, had been discharged from the suit. In March, 1938, notices under Order XXI, rule 22, were served and attachment under Order XXI, rule 54, effected. On the 30th of that month, the 6th of June, 1938, was fixed for the sale of the attached properties. On the 17th of April, 1938, Lachmi Prasad Narain Singh died. The original defendants 2 to 4 were then brought on the record as Lachmi Prasad's representatives and objected to execution against the property attached, while the decree-holders went on urging that at least eight annas, the share of the deceased father in that property of the joint family, ought to be put to sale. Ultimately this contention of the decree-holders was accepted by the Court below.

Defendants 2 to 4, who, as we have already stated, were brought on the record again after the death of Lachmi Prasad Narain Singh, appeal, and the first point urged on their behalf is that the attachment of the property in the life-time of Lachmi Prasad Narain Singh ceased to be of any effect on his death, and that they, the appellants before us, took the whole of the property attached by survivorship. This contention must plainly be overruled. In somewhat similar circumstances it was decided by their Lordships of the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(1) that the execution proceedings under which a mauza belonging to the joint

(1) (1878) I. L. R. 5 Cal. 148, P. C.

family had been attached and ordered to be sold " had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land to the extent of the judgment-debtor's undivided share and interest therein which could not be defeated by his death before the actual sale ". Mr. Lachmi Kant Jha has urged that that decision is distinguishable because the decree in that case was a mortgage decree. But the property was attached in execution of the decree and the decision plainly turns not on the interest created by the mortgage but on the attachment and possibly also the order for sale—elements which are both present in the case before us. *See* also *Faqir Chand* v. *Sant Lal*(1), where the attachment was in execution of a money decree and it does not appear whether the order for sale was made in the life-time of the judgment-debtor in question. It has also been contended on behalf of the appellants that if the father's interest continues to be available to the decree-holders by reason of the attachment, notwithstanding the judgment-debtor's death, what should be put up to sale in execution is not the father's specified share, but his right, title and interest, such as it may be, in the property attached. This is rested on the well-known dictum that in a joint Hindu family the share of no individual member can be predicated at any moment except at the time of partition. But that dictum has no application to the facts of the present case. The decree-holders are entitled to proceed against what would have been Lachmi Prasad Narain Singh's share at the time of his death, and it cannot be pretended that any subsequent happenings could, in view of the attachment and the death, either increase or reduce that share. It has also been urged on behalf of the appellants that as the decree-holders attached the entire property as the property of the joint family, it is not competent to them now to put up to sale the eight-annas share of

(1) (1925) I. L. R. 48 All. 4.

1939.

BHUBNESHWAR PRASAD NARAIN SINGH v. KHEMCHANDRA.

the judgment-debtor. But the greater includes the less, and it is impossible to accept the contention.

The appeal is dismissed with costs.

S. A. K. *Appeal dismissed.*

FULL BENCH.

DHAVLE AND ROWLAND, JJ.

Before Harries, C.J., James and Agarwala, JJ.

MAHANTH DWARKA DASS

v.

BHEKHU MAHTON.*

1939.

March, 20, *April*, 17.

Landlord and Tenant—occupancy holding—mafi on condition of rendering services as Jeth raiyat—landlord, whether entitled to dispense with the services—tenant's holding, whether a service tenure and a grant burdened with services—tenant's claim to remission on dispensation with services, whether tenable—decision as to annual rent payable or dispute regarding tenant's status—second appeal, maintainability of—Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *section* 153.

In the record-of-rights the tenant was recorded as a settled raiyat of the village liable to pay a certain rent. There was an entry to the effect that at the end of the year the raiyat received Rs. 12 as *haqajri* on condition of rendering services as a *jeth* raiyat, assisting the landlord in the collection of rent. The holding was subsequently partitioned into three holdings, one occupier having taken half of the original holding and two others a quarter each. The landlord instituted three suits for rent claiming a proportionate amount from each of the tenants who, however, contended that the right to deduct Rs. 12 was an incident of the tenancy, so that each of them was entitled to a proportionate remission

*Appeals from Appellate Decrees nos. 655 to 657 of 1936, from a decision of Babu Dwarika Prashad, Subordinate Judge of Muzaffarpur, dated the 28th March, 1936, confirming a decision of Babu Kamini Kumar Banarji, Munsif of Muzaffarpur, dated the 12th September, 1935.