

APPELLATE CIVIL.

Before Coldstream and Bhide JJ.

SHIVDEV SINGH (OBJECTOR) Appellant

*versus*KARAM CHAND AND SONS (DECREE-HOLDERS)
Respondents.

Civil Appeal No. 952 of 1932.

Civil Procedure Code, Act V of 1908, sections 47, 53—Mortgage-decree directing sale of mortgaged property—Execution against son of deceased mortgagor—Objection that the mortgage is void being without necessity and tainted by immorality — whether can be decided by executing Court — Section 53—purpose of—explained.

The respondents obtained a decree for sale of immoveable property mortgaged to them by J., and after J.'s death the respondent proceeded to execute the decree, impleading J.'s son as a representative of the deceased judgment-debtor. The son put forward an objection in the executing Court that the property concerned was not saleable under the decree, because the mortgage by J. had not been effected for necessity and was tainted with immorality. The Court dismissed the objection holding that the representative of the judgment-debtor was not entitled to attack the decree in execution proceedings on the allegations made. In appeal to the High Court it was contended on behalf of the son that the objection should have been decided by the executing Court under section 47 of the Code of Civil Procedure.

Held, (overruling the contention) that there is a difference between a decree which leaves the manner of its execution to be decided by the executing Court, and one which specifies certain property as chargeable with the debt found due and unconditionally directs its sale to satisfy the decree, as in the present case.

The objection in this case clearly disputes the validity of the decree itself and does not raise a question relating to the execution, discharge or satisfaction of the decree within the ambit of section 47 of the Code of Civil Procedure.

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Sanwal Das v. Bismillah Begam (1), and *Zamindar of Karvetnagar v. Trustee of Tirumalai* (2), relied on.

Other cases discussed.

Miscellaneous appeal from the order of Sardar Harnam Singh, Subordinate Judge, 1st Class, Lahore, dated 10th June, 1932, dismissing the appellant's objection in limine.

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MEHAR CHAND MAHAJAN and CHUNI LAL VOHRA,
for Appellant.

TIRATH RAM, for Respondents.

COLDSTREAM J.—The respondent firm, Karam Coldstream J. Chand and Sons, obtained a decree for sale of immoveable property mortgaged to them by Jhanda Singh, a *raia* of Lahore District. Jhanda Singh died. Karam Chand and Sons proceeded to execute the decree, after impleading Jhanda Singh's son, Shiv Dev Singh, the present appellant, as representative of the deceased judgment-debtor.

On the 30th March, 1932, Shiv Dev Singh put forward an objection in the executing Court that the property concerned was not saleable under the decree because its mortgage by Jhanda Singh had not been effected for necessity and was tainted with immorality.

The Court dismissed this objection holding that the representative of the judgment-debtor was not entitled to attack the decree in execution proceedings on the allegations made. He cited *Hira Lal Sahu v. Parmeshar Rai* (3), *Hitendra Singh v. Maharaja Dhiraj Sir Rameshwar Singh Bahadur* (4) and *Gulbi v. Sawan* (5).

Against this dismissal Shiv Dev Singh has appealed. It is contended on his behalf that the

(1) (1897) I. L. R. 19 All. 480. (3) (1899) I. L. R. 21 All. 356.

(2) (1909) I. L. R. 32 Mad. 429. (4) (1925) I. L. R. 4 Pat. 510.

(5) (1923) I. L. R. 4 Lah. 72.

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weight of judicial authority is against the view adopted by the executing Court, that the objection raised relates to the execution and satisfaction of the decree and is therefore one to be dealt with by the executing Court under the provisions of section 47 of the Code of Civil Procedure and not by a separate suit, that no distinction is made in that section between mortgage and other decrees, and that the judgment *Hira Lal Sahu v. Parmeshar Rai* (1) which referred to the provisions of section 244 of the Code of 1882 is not now applicable in view of the change in the law made by the new section 53 of the present Code.

In support of the proposition that section 47 justifies no distinction between the functions of a Court executing a simple money decree and one executing a decree under Order 34 of the Code, Mr. Mehr Chand refers to *Mussammatt Aisha v. Jawahir Mal* (2). That was a case decided by a Single Judge of this Court who based his decision on judgments dealing with the execution of money decrees, remarking that section 47 was wide enough to cover all decrees in execution of which the question of the title of the judgment-debtor to the property sought to be sold arises as between the decree-holder and such judgment-debtor or his legal representative.

Certainly no distinction is drawn by section 47 between one kind of a decree and another, but the real question here is simply this, whether an objection on the grounds taken by the appellant relates to the execution, discharge or satisfaction of a decree, or does it question the validity of the decree itself; and in order to decide this question it is surely necessary to have regard to the nature of the decree. From this

(1) (1899) I. L. R. 21 All. 356.

(2) 1929 A. I. R. (Lah.) 762.

point of view there is certainly a difference between a decree which leaves the manner of its execution to be decided by the executing Court and one which specifies certain property as chargeable with the debt found due and unconditionally directs its sale to satisfy the decree. This difference is clearly described in *Sanwal Das v. Bismillah Begam* (1), where it was pointed out that a decree for money is not based upon an adjudication that any property which may subsequently be brought to sale in execution of the decree is the property of the judgment-debtor or property which is liable for his debts.

This view was given emphatic approval by the Madras High Court in *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devastanams* (2). Having regard to the essential difference apparent between the two kinds of decrees, I think it unnecessary to refer to all the numerous judgments cited before us which, without laying down any general principle, have decided cases where the objection related to the execution of simple money decrees. Nor is it useful to refer to judgments arising out of objections put forward by the judgment-debtor himself as distinct from a representative impleaded for the purpose of execution; for, so far as the judgment-debtor is concerned, a mortgage decree obviously decides not only that the property is saleable in execution but that it is saleable in execution against him.

In the present case Mr. Mehr Chand's argument is that his client does not question the validity of the decree but merely its executability against the objector, a matter which, he contends, is within the

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(1) (1897) I. L. R. 19 All. 480. (2) (1909) I. L. R. 32 Mad. 429.

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purview of section 47. For this argument he finds support in *Babu Lal v. Janak Dulari* (1). As authority for his proposition that the rulings upon the intention of section 244 of the old Code such as *Hira Lal Sahu v. Parmeshar Rai* (2) and *Hitendra Singh v. Maharaja Dhiraj Sir Rameshwar Singh Bahadur* (3) must be disregarded in view of the amendment of the Code in 1908, he cites *Sheikh Karoo v. Rameshwar Sao* (4) and *Babu Lal v. Janak Dulari* (1).

It is well established law that an executing Court must execute a decree as it stands and cannot alter or vary it in execution, and with due respect to the learned authorities cited against this view I am unable to concede the proposition that an executing Court which refuses to sell property the sale of which has been decreed under Order 34 does not interfere with the decree but merely "interprets" the decree so as to decide on what part of the mortgagor's estate it is binding. Nor am I able to see why the fact that this question, whether the mortgage bound the whole estate or not, was not decided in the suit must of necessity entitle the mortgagor's representative to say in execution proceedings that the decree as it stands ought never to have been passed, or should be "interpreted" as a decree limited by a condition that the property concerned will not be saleable in the hands of the mortgagor's successor if the latter shows that the debt was incurred for a purpose tainted with immorality. So long as the decree is valid (and, as already explained, Mr. Mehr Chand is careful not to question the validity of the decree before us) and it is not a nullity, and is executable

(1) (1926) I. L. R. 48 All. 429. (3) (1925) I. L. R. 4 Pat. 510.

(2) (1899) I. L. R. 21 All. 356. (4) (1921) I. L. R. 6 Pat. L. J. 451, 460.

(this decree is clearly executable) the executing Court must execute it. The judgments in *Liladhar v. Chaturbhuj* (1), *Hiru Lal Sahu v. Parmeshwar Rai* (2), which were cited with approval in *Khetrapal Singh Roy v. Shyama Prosad Barman* (3), *Jagar Nath Singh v. Sheo Ghulam Singh* (4) and *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams* (5), are directly to the point here. As against these authorities appellant's counsel points to *Kuriyali v. Mayan* (6). In that judgment reliance was placed on the Privy Council judgment in *Chowdry Wahed Ali v. Mussammatt Jumae* (7) and the Privy Council mentioned it with approval in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (8). Mr. Mehr Chand contends that the judgment of the Judicial Committee is conclusive in his favour.

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In *Chowdry Wahed Ali v. Mst. Jumae* (7) their Lordships decided that a party sued in a representative character was a party in the suit within the meaning of section 11 of the Act XXIII of 1861, read with Act VIII of 1859, but they also found that there was no existing decree authorising an execution against the estate and that, under the peculiar and exceptional circumstances of the case, Act XXIII of 1861 was not a bar to a suit by the plaintiff who was resisting execution against the property in his possession. This judgment does not help us to a decision of the point before us now.

The Madras Court has itself dissented from *Kuriyali v. Mayan* (6) in *Kumaretta Servaigaran v.*

(1) (1899) I. L. R. 21 All. 277. (5) (1909) I. L. R. 32 Mad. 429, 439.
(2) (1899) I. L. R. 21 All. 356. (6) (1884) I. L. R. 7 Mad. 255.
(3) (1905) I. L. R. 32 Cal. 265. (7) (1872) 11 Bengal L. R. 149 (P.C.).
(4) (1908) I. L. R. 31 All. 45. (8) 1892) I. L. R. 19 Cal. 683 (P.C.).

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Sabapathy Chettiar (1) and in *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devastanams* (2), where Sir Arnold White, Chief Justice and Abdur Rahman J. held that it was wrong. In the latter judgment there is a reference to *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3). As pointed out by a Full Bench of the Calcutta Court in *Kartick Chandra Ghose v. Ashutosh Dhara* (4) [with reference to *Kuriyali v. Mayan* (5)] all that the Judicial Committee decided in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3) was that section 244 of the old Code did not cease to be applicable to proceedings in execution merely because the execution purchaser was a stranger to the suit. The Full Bench judgment was, it is true, dissented from by a Division Bench of the Lucknow Court in *Shah Naim Ata v. Lala Girdhari Lal* (6). The case there, like the one before the Calcutta Full Bench was one in which execution was sought of a simple money decree. Neither judgment is binding upon us, but following the view taken of the effect of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3) by the Calcutta Full Bench I am clearly of opinion that section 244 of the Code of 1882 was rightly interpreted in *Kumaretta Servaigaran v. Sabapathy Chettiar* (7) and *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devastanams* (2). I am fortified in this opinion by the remarks of Das J. at pages 531, 532 and by Dawson Miller C. J. at page 600 of *Hitendra Singh v. Maharaja Dhiraj Sir Rameshwar Singh Bahadur* (8).

(1) (1907) I. L. R. 30 Mad. 26.

(5) (1884) I. L. R. 7 Mad. 255.

(2) (1909) I. L. R. 32 Mad. 429, 441.

(6) (1927) I. L. R. 2 Luck. 145.

(3) (1892) I. L. R. 19 Cal. 683.

(7) (1907) I. L. R. 30 Mad. 26.

(4) (1912) I. L. R. 39 Cal. 298 (F. B.).

(8) (1925) I. L. R. 4 Pat. 510.

There remains for consideration Mr. Mehr Chand's contention that even if these and other rulings to the same effect were correct, the law has been altered by the amendment of sub-section 3 of section 47 and the enactment of section 53 in the Code of Civil Procedure, 1908. In *Babu Lal v. Janak Dulari* (1), it was remarked that the old section has been altered and the provisions of section 47 of the present Code make it quite clear that the question whether or not an alleged legal representative does or does not occupy that capacity as to be bound by the decree is one to be decided by the executing Court. A similar view of the amendment was expressed by Jwala Prasad J. (with whom Adami J. concurred) in *Sheikh Karoo v. Rameshwar Sao* (2) where it was held that sections 52 and 53 settled the question (so I understand the judgment) by providing that for the purpose of executing decrees, "property in the hands of a son or other descendant, which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be the property of the deceased which has come into the hands of the son or other descendant as his legal representative."

There is in my mind no doubt as to the intention with which section 53 was enacted. It was enacted to settle a question on which there was a conflict of judicial decisions. The question was whether, inasmuch as the sons of a Hindu father succeed to ancestral property by survivorship, coparcenary property can be proceeded against in execution of a decree against the father although, according to

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(1) (1926) I. L. R. 48 All. 429. (2) (1921) 6 Pat. L. J. 451.

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judicial authority, it is not property of the deceased which has come into the hands of his sons or other descendants as his legal representatives. The section makes it clear that such property can be followed by the decree-holder in execution of his decree without his obtaining a decree to the effect that the property is liable for the debts of the deceased. The result is that if the decree is such as to leave it to the executing Court to determine what property is liable, then an objection by the son or other descendant on the ground that the debt in respect of which the decree was passed was tainted with immorality or was for some other reason not binding on the sons, must be enquired into by the executing Court. But a decree passed under Order 34 determines unconditionally that certain property is chargeable and shall be sold and I can see no justification in the words "which is liable under the Hindu Law for the payment of the debt of a deceased ancestor," for the view that this section was intended to allow the representative of the judgment-debtor in a mortgage-decree to resist proceedings in the executing Court on the plea that the decree itself ought not to have been passed as it stands but with a qualification in favour of the judgment-debtor's representatives if these turned out to have succeeded by survivorship and could show that the deceased ought not to have contracted the debt on which the decree was based. (I may here note that it is admitted on both sides that in respect of this power to alienate urban immoveable property Jhanda Singh was bound by the Hindu Law). Such a plea, I repeat, is not one relating to the execution of the decree, the executability and validity of which is obvious, but to the propriety of

the decree itself, which can only be determined by a separate suit. Nor do I see force in the argument that because section 47 compels the executing Court to decide whether any person is or is not a representative of a party (the old law gave the executing Court discretion to decide the matter or stay execution until it was decided by suit) it must entitle a person who has been impleaded as a representative of a judgment-debtor to attack the validity of the decree, thus giving him rights in the executing Court wider than those of the judgment-debtor himself. The representative is appointed merely to allow execution to proceed. No question arises in the execution of a decree passed under Order 34 as to what property is to be proceeded against under section 50. The property has been specified in the decree and an enquiry whether this specification was proper is outside the scope of an executing Court.

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The case is on all fours with appeal No. 150 of 1933. The only point for decision there was the one before us now, the Court executing a mortgage decree having refused (following *Khetrapal Singh Roy v. Shyama Prosad Barman* (1), *Kumaretta Servaigaran v. Sabapathy Chettiar* (2) and *Zamindar of Karvetnagar v. Trustee of Tirumala, Tirupati, etc., Devas-tanams* (3) to entertain an objection by the present appellant on grounds similar to those put forward again by him here. The appeal was dismissed without notice to the opposite party by Harrison and Agha Haidar JJ.

For the reasons given I would hold that the executing Court's order is proper and I would dismiss the appeal with costs accordingly.

(1) (1905) I. L. R. 32 Cal. 265. (2) (1907) I. L. R. 30 Mad. 26.

(3) (1909) I. L. R. 32 Mad. 429.

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Mr. Mehr Chand has asked that if the appeal be dismissed we should order the executing Court to treat the objection as a suit. The Court had discretion to do this and we must assume that it did not think it necessary to exercise it. No such request was made to the executing Court and there is none in the memorandum of appeal. I see no sufficient reason now to make the order asked for.

BHIDE J.

BHIDE J.—I agree.

A. N. C.

*Appeal dismissed.***REVISIONAL CRIMINAL.***Before Tek Chand J.*

KALYAN DAS (CONVICT) Petitioner

versus

THE CROWN—Respondent.

Criminal Revision No. 1242 of 1933.

Special Powers Ordinance, X of 1932, Section 17—conviction thereunder — after date of its expiry — legality of — General Clauses, Act X of 1897, Section 6.

The petitioner was prosecuted under section 17 of the Special Powers Ordinance, X of 1932. The prosecution was started on the 30th September, 1932, but the petitioner was convicted and sentenced on the 31st March, 1933. In the meantime the Ordinance had expired automatically on the 29th December, 1932.

Held, that as the provisions of section 6 of the General Clauses Act are not applicable to a temporary statute, which expires automatically on a given date, proceedings which were pending under the Special Powers Ordinance, X of 1932, on the date of its expiry, could not be continued in the absence of a clear statutory provision to that effect, and that the conviction of the petitioner under section 17 of the Ordinance was, therefore, illegal and *ultra vires*.

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Feb. 2.