

Reference has been made to verse 29, which referring apparently to the succession to a woman's *sulka*, speaks of the "whole brother." This rather supports the contention of the plaintiff than that of the defendants in this case; for the verse indicates that when a person connected by half blood is meant to be excluded, the author says so. And it seems to us that if the son of a rival wife is entitled to succeed, under verse 31 and two succeeding verses 32 and 33, it is very difficult to exclude the step-sister's son.

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The Subordinate Judge has referred, in his judgment, to the translation as given by Shyama Charan Sarkar of the words "sister's son," as occurring in the table of succession in his book "Vyavastha Darpana." Those words have been translated as "নিজ ভগিনী পুত্র" (own sister's son.) The words in the original text simply mean "sister's son," "her sister's son;" and it would seem that in the table of succession the next in order being the husband's sister's son, the author probably used the words "নিজ ভগিনী পুত্র" as contradistinguished from her husband's sister's son.

The Subordinate Judge, we observe, is not prepared to hold that the step-sister's son is no heir at all, for he says: "they may however come to succeed after the list given is exhausted," meaning the list given by Shyama Charan Sarkar. But it seems to us that if he is an heir he is entitled to succeed in preference to husband's elder brother, he being, so far as the question before us is concerned, practically in the position of the "sister's son" of the deceased woman, as mentioned in the verses to which we have referred.

Upon all these grounds, we set aside the judgments of the lower Courts dismissing the claim of the step-sister's son, and send back the case to the Court of first instance for a decision upon the other questions arising in the case.

Costs will abide the result.

Appeal allowed : case remanded.

32 C. 265.

[265] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

KHETRAPAL SINGH ROY, v. SHYAMA PROSAD BARMAN.*

[25th November, 1904.]

Execution of Decree—Mortgage—Decree for sale—Civil Procedure Code (Act XIV of 1882) s. 244, cl. (c)—Jurisdiction.

A judgment-debtor against whom a decree for sale has been passed as the legal representative of the mortgagor, is not entitled to object, in the execution proceedings, to the property being sold on the ground that it was not the property of the mortgagor.

Section 244 (c) of the Civil Procedure Code does not apply to a case where the judgment-debtor tries to set aside the effect of a decree.

Sanwal Das v. Bismillah Begam (1), *Liladhar v. Chaturbhuj* (2), and *Hiralal Sahu v. Parmeshar Rai* (3) followed.

Ram Chandra Mukerjee v. Ranjit Singh (4) distinguished.

[Fol. 30 Mad. 26=16 M. L. J. 545; Ref. 8 C. L. J. 20.]

* Appeal from Order, No. 126 of 1904, against the order of G. K. Deb, District Judge of Hooghly, dated Jan. 28, 1904, reversing the order of Kalidhan Chatterjee, Subordinate Judge of that District, dated Sept. 14, 1903.

(1) (1897) I. L. R. 19 All. 480.

(3) (1899) I. L. R. 21 All. 356.

(2) (1899) I. L. R. 21 All. 277.

(4) (1899) I. L. R. 27 Cal. 242.

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APPEAL by the decree-holders, Khetrupal Singh Roy and another.

The decree-holders obtained an *ex parte* decree for sale against the judgment-debtor as the legal representative of Radhamani, the mortgagor. An application was made under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside, but the application was refused. In execution of the decree the mortgaged property was advertised for sale when the judgment-debtor preferred objection under sec. 244 of the Code of Civil Procedure saying that the property belonged to him and did not belong to the mortgagor, and prayed for stay of the sale.

The Subordinate Judge overruled the objections, but his decision was reversed, on appeal, by the District Judge. The decree-holders then preferred this appeal.

[266] Dr. *Rash Behary Ghose* and *Babu Shorashi Charan Mitra*, for the appellants.

Babu Nilmadhab Bose and *Babu Bipin Behari Ghose*, for the respondent.

PRATT AND MITRA, J.J. This appeal relates to the execution of a decree passed on a mortgage.

The judgment-debtor, who is the respondent before us, was a party to the suit. He applied to have the decree set aside in a proceeding under section 108 of the Code of Civil Procedure on the allegation that summons had not been served upon him. That application was refused. The mortgage decree then became final; and the decree-holders, who are the appellants before us, attempted to execute it by the sale of the property directed to be sold by the decree. The judgment-debtor applied under section 244 of the Code to have the sale stayed, on the ground that the property attempted to be sold was not the property of the mortgagor.

The Subordinate Judge who tried the case in the first instance came to the conclusion that it was not competent to the judgment-debtor, he having allowed the decree to be passed against him, to say that the decree as it stood was incapable of execution.

The judgment debtor then appealed to the District Judge and repeated the contention raised by him before the Subordinate Judge. The learned District Judge, relying on some observations in the case of *Ram Chandra Mukerjee v. Ranjit Singh* (1), came to the conclusion, though we must say reluctantly, that the judgment-debtor could go behind the decree and contend that the property was not saleable in execution. He accordingly set aside the order of the Subordinate Judge and directed a trial on the merits.

The present appeal is against the order of the District Judge. We are of opinion that *Ram Chandra Mukerjee v. Ranjit Singh* (1) does not help the respondent in his contention that he is entitled now to say that the property directed to be sold by the decree is not saleable because it was not the property of the mortgagor. Our attention has been drawn to a passage at page [267] 257 of the report. It does not seem to us that the learned Judges there intended to lay down that in a case like the one before us there could be an objection to the sale on the ground of the invalidity of the decree as regards the property to be sold. On the other hand, there are cases to which the learned pleader for the appellants has drawn our attention and which fully support the view taken by the Subordinate

(1) (1899) I. L. R. 27 Cal. 242.

Judge. *Sanwal Das v. Bismillah Begam* (1), *Liladhar v. Chaturbhuj* (2) and *Hiralal Sahu v. Parmeshar Rai* (3) go to show that the contention of the judgment-debtor is not maintainable.

Clause (c) of section 244 does not seem to us to be intended to apply to a case where the judgment-debtor tries to set aside the effect of a decree. It refers to proceedings in execution based on the decree as if the decree was perfectly good and valid.

We therefore set aside the order of the District Judge and restore that of the Subordinate Judge, the decree-holders being competent to proceed to the sale of the mortgaged property as directed by the decree obtained by them. The costs of this appeal must be borne by the respondent.

Appeal allowed.

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32 C. 268.

[268] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Brett.

FURZAND ALI v. MOHANTH LAL PURI.*

[11th January, 1905.]

Court-fee—Court-Fees Act (VII of 1870), s. 7, cl. XI (e)—Occupancy holding, suit for possession of—.

Section 7, cl. 11 (e) of the Court-Fees Act (VII of 1870) does not apply to a suit for possession of an occupancy holding brought by the tenant against the landlord and as well as the person whom the landlord has inducted into the land; the court-fee payable on the plaint in such a case must be computed on the market-value of the property which the plaintiff seeks to recover.

[*Fol* : 31 *Mad.* 14=3 *M. L. T.* 9=17 *M. L. J.* 478 ; *Ref.* 19 *C. L. J.* 418=25 *I. C.* 507 ; 23 *I. C.* 904 ; 16 *C. L. J.* 375=16 *I. C.* 968.]

SECOND APPEAL by the plaintiff, Shekh Furzand Ali.

The allegations in the plaint material to this report are that the lands in suit formed the *maurusi-jote* of the plaintiff under the landlords, defendants Nos. 1 and 2; that the latter had collusively executed a *thika patta* in respect of the said lands in favour of defendant No. 3 and that the three defendants had dispossessed him from the said lands; he therefore instituted this suit against all the three defendants to recover possession of the lands on declaration of his *maurusi-jote* right.

The plaintiff valued his suit at one year's rental according to s. 7, cl. 11 (e) of the Court-Fees Act, and brought the suit in the Munsif's Court. The Munsif held that that section did not apply and finding that the market-value of the land exceeded his jurisdiction, returned the plaint which was then presented before the Subordinate Judge. He also held that s. 7, cl. 11 (e) of the Court-Fees Act did not apply and called on the plaintiff to pay Court-fee on the market-value of the land. As the plaintiff did not do so the plaint was rejected.

[269] This order was affirmed by the District Judge on the ground that although s. 7, cl. 11 (e) of the Court-Fees Act did apply to the case, the plaintiff having accepted the Munsif's valuation for the purpose of

* Appeal from Appellate Decree, No. 2077 of 1902, against the decree of W. B. Brown, District Judge of Patna, dated June 5, 1902, affirming the decree of Jogendra-nath Dev, Officiating Subordinate Judge of Patna, dated Feb. 21, 1902.

(1) (1897) I. L. R. 19 All. 480.

(3) (1899) I. L. R. 21 All. 356.

(2) (1899) I. L. R. 21 All. 277.