

Chander Pershad Vs. Sham Koer

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Court : Kolkata

Decided On : Nov-24-1905

Reported in : (1906)ILR33Cal676

Judge : Pratt and ;Bodilly, JJ.

Appellant : Chander Pershad

Respondent : Sham Koer

Judgement :

Pratt and Bodilly, JJ.

1. The question raised in this appeal is whether the Subordinate Judge was right in allowing the decree-holder to execute his mortgage-decree against the objector, whose deceased father was the judgment-debtor. The parties are governed by the Mitakshara law, and the objector was not a party to the suit upon the mortgage. The Sub-Judge observes that there was no evidence that the objector was alive at the time when the decree was obtained, but we gather from the record that the parties were not called upon to adduce evidence and that the Court did not frame or investigate any issue of fact. The objector claims the mortgaged property by survivorship and not as legal representative of his father. There is some conflict of views on this question in the various High Courts. The appellant relies upon *Juga Lal Chandhuri v. Audit Behari Prosad Singh* (1900) 6 C.W.N. 223 and *Kali Krishna Sarkar v. Raghunath Deb* (1903) I.L.R. 31 Calc. 224, which however refer to

money decrees, also on Bhauani Prasad v. Kallu (1895) I.L.R. 17 All. 537, while the respondent relies mainly upon Timed Hathising v. Goman Bhaiji (1895) I.L.R. 20 Bom. 385, which fully supports his contention. We also find that in the case of Collenridge v. Pheku Sakai Unrep. Mis. App. No. 7 of 1905, dated 4th August, 1905 decided by Henderson and Mitra JJ. a money decree against a father was allowed to be executed after his death against the ancestral property in the hands of the son, which had been attached in. the father's lifetime, the son being only permitted to have the question tried under Section 244, Civil Procedure Code, as to whether the debt had been contracted for immoral purposes.

2. In the present case the property was subject to the charge created by the mortgage decree and did not therefore require to be attached. We think that decision is consonant with justice and that we ought to follow it. No useful purpose would be served by compelling the plaintiff to sue the son for a declaration that the property in his hands is liable to be sold in execution of the mortgage decree, for in such a suit the son would be confined to the very defence, which is open to him to take in execution, as previously indicated.

3. We accordingly dismiss this appeal with costs.

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