

(1909) 11 AHC CK 0009**Allahabad High Court****Case No:** None

Hafiz Ghafoor-Ud-Din

APPELLANT

Vs

Hafiz Hamid Husain and Others

RESPONDENT

Date of Decision: Nov. 29, 1909**Citation:** 4 Ind. Cas. 406**Hon'ble Judges:** John Stanley, C.J; Banerji, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

1. This appeal arises out of a suit brought u/s 283 of Act No. XIV of 1882 under the following circumstances: One Fakhr-ud-din had two wives namely Musammat Latifunnissa and Musammat Shakurunnissa. The latter died in 1894 and on her death Ghafoor-ud-din, plaintiff-appellant, her brother, brought a suit claiming one-half of the amount alleged to be her dower. He got an ex parte decree against Fakhr-ud-din on the 19th of January 1898 and in execution of that decree caused certain property to be attached in February 1898. Fakhr-ud-din appealed against the decree to this Court and thereupon the case relating to the execution of the decree was struck off the files on the 24th of December 1898. This Court set aside the ex parte decree on the 26th of November 1900 and remanded the case to the Court below for fresh trial. The lower Court re-heard the case and made a decree for Rs. 75 but upon appeal to this Court that decree was varied and a decree was made on the 27th of April 1904 for the full amount claimed by the plaintiff. Mean while Fakhur-ud-din died and his second wife Latifunnissa and his sister Nasirunnissa were brought upon the record as his legal representatives.

2. After the passing of the final decree of this Court, application was made for execution of that decree and certain property was attached in 1905. The defendant Hamid Husain filed an objection and prayed for the release of the property from attachment on the allegation that under a sale made in his favour on the 9th of August 1898 he was the owner of the property and it was not liable to sale. This

objection having been allowed the suit out of which this appeal has arisen was brought by the plaintiff for a declaration that the property was liable to be sold in execution of his decree. The Court below has dismissed the suit on the ground that Hamid Husain must be deemed to be a representative of the judgment-debtor within the meaning of Section 244 of Act No. XIV of 1882 and that the suit was, therefore, not maintainable. It is contended on behalf of the appellant that as the decree made by the Court of first instance on the 19th of January 1898 was set aside by this Court, everything which took place in execution of that decree came to an end and that, therefore, by reason of his having purchased the property during the pendency of an attachment in execution of the decree which was set aside the defendant cannot be deemed to be the representative of the judgment-debtor within the meaning of Section 244. This contention is in our judgment well-founded. Indeed the learned Counsel for the respondent has not disputed its correctness.

3. As the decree in execution of which the property was attached in 1898 was set aside by this Court on the 26th of November 1900 everything that was done in pursuance of that decree came to an end and, therefore, the defendant cannot be said to be the purchaser of the property pending a subsisting attachment. The matter could not form the subject for an adjudication u/s 244 of the CPC 1882 and this suit was maintainable against the defendant. We accordingly allow the appeal and as the suit was dismissed upon a preliminary ground and the decision of the Court below on that ground is erroneous we remand the case to that Court under Order 41, Rule 23 of the CPC with directions to re-admit it under its original number in the register and to dispose of it on the merits. Costs here and hitherto will follow the event and the costs of this Court will include fees on the higher scale.