

(1913) 06 CAL CK 0003

Calcutta High Court

Case No: Appeal from Appellate Decree No. 346 of 1909

Nabin Chandra Saha  
and Org.

APPELLANT

Vs

Hem Chandra Ray and  
AnotherRESPONDENT

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**Date of Decision:** June 10, 1913**Citation:** (1913) 06 CAL CK 0003**Final Decision:** Dismissed

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### Judgement

1. In this case the Plaintiffs sued for the recovery of eight annas share in some land as the heirs of their uncle Sarada Churn after the death of their grandmother Siba Sundari who acquired the estate of a Hindu widow in the property in question after Sarada's death. They succeeded in the first Court, but on appeal the suit was partly decreed and partly dismissed. In a second appeal, in which some of the Defendants are Appellants, three points have been raised, and it is not necessary to re-(2) 17 C. W. N. 701 (1913). capitulate more of the facts of the case, which have already been very fully dealt with, than are necessary for the determination of those points. The first arises as follows: After Sarada's death, Siba Sundari his mother, and Gobinda, his brother, the father of the Plaintiffs, were each entitled to an eight annas share of the property, the whole of which was registered in the name of Siba Sundari and was managed by Gobinda. In these circumstances, a kobala was executed of Gobinda's share in favour of the Defendants, but in the name of Gobinda and Siba Sundari, who, however, refused to admit their execution when the Defendants attempted to procure registration. A decree was obtained in a suit brought to enforce registration, and in execution of an order for costs contained in the decree two lots of the property now in suit were sold and purchased by the Defendants. The question we have to decide is whether the interests of the Plaintiffs as heirs to Sarada passed under that sale. Both the Courts below have held that they did not : and we agree in that finding. It may be that there is no difference between a case like the present, where an order for costs is executed, and one in which the execution is to effect a relief granted like the delivery of possession, but it is impossible to escape the

conclusion that the general rule laid down by the Privy Council in *Jugal Kishore v. Jotindra Mohan I. L. R. 10 Cal. 985 at p. 991 (1884)*. applies. "If the suit is merely for a personal claim against the widow, then merely the widow's qualified interest is sold, and the reversionary interest is not bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes." The Subordinate Judge has discussed the nature of the suit in which the execution proceedings took place very fully, and came to the conclusion that, as far as Siba Sundari's eight annas share was concerned, nothing more passed in the sale than her Hindu widow's interest. The District Judge agreed with him, and taking the question to be one of mixed law and fact, we find that this decision is right. It has been suggested that as Gobinda was the person next entitled to enjoy Siba Sundari's property after her death, an execution levied against her and him could pass the whole estate. But we are not aware of any authority for saying that an involuntary alienation, as in an execution, is equivalent to a voluntary grant : and the argument put forward seems inconsistent with the principles laid down in *Debi Prosad v. Golap Bhagat 17 C. W. N. 701 (1913)*, and with the decision in *Mohim Chandra v. Kashi Kant 2 C. W. N. 161 (1897)*.

2. The second point is that certain sales in execution of rent decrees under which the Defendants claim a right to the entire interest in the property in question were valid. The sale took place after the sale by Siba Sundari and Gobinda, and, were, it is suggested, effected in order to give a better title to the Defendants. Both the lower Courts have held them to be fraudulent and collusive. Under the circumstances of the case, fully set out by the Subordinate Judge, we must accept this as a finding of fact.

3. The third point made by the Appellants is that set out in the 10th issue in the first Court, and is that Siba Sundari and Gobinda mortgaged portions of the disputed properties to Kumudamoyee Chaudhrain, to Kumar Chandra Talapatra, and to Madan Mohan and Nobin Chandra Saha. Bholanath, Defendant No. 12, paid the mortgage debts, as also certain sums due for rent and the costs of settlement proceedings. There is, therefore, a lien on the disputed properties for those payments by Bholanath, and for the debt due under the mortgage to Madan Mohan and Nobin Chandra. The Subordinate Judge has disposed of these claims by finding that the debt to Kumudamoyee was paid, and a mortgage contracted by Siba Sundari and Gobinda paid off by Bholanath, but that as the debt was contracted *pendente lite*, it cannot bind the estate. The same is held to be the case with the mortgage to Kumar Talapatra, where it is held that the money was paid by all the Appellants. The payment in respect of Nabin Chandra and Madan Mohan's mortgage he holds to be collusive. He also finds reasons founded in fact for holding that the smaller sums paid for arrears of rent and the cost of settlement are not recoverable from the Respondents. He comes to no finding on the question of the existence of any lien under the mortgage. All these findings seem to be accepted by the lower Appellate Court, though this is not done specifically, as it should have been. He, however, goes into the question of the effect of the mortgage last referred to, and finds that the purpose for

which the money was borrowed is not clear, but that as the mortgage was contracted by a Hindu widow and a reversioner, it bound the reversion as much as it would have done, had it been entered into by a full owner. For this finding, he relies on the decision in *Raj Bullubh v. Oomesh Chandra* ILR 5 Cal 44 (1878), but this case must now be taken as superseded by *Debi Prosad v. Golap Bhagat* 17 C.W.N. 701 (1913), referred to above, according to which the concurrence of the reversioner with the Hindu widow could not, in the present case, do more than raise a presumption that the mortgage was entered into under necessity. The lower Court has, however, decided this point in favour of the Plaintiffs decreeing the suit, but putting the Plaintiffs into possession of the land in dispute subject to the mortgage of Rs. 2,000. The Appellant in this appeal therefore fails, and the appeal is dismissed with costs.