

(1878) 05 CAL CK 0013

Calcutta High Court

Case No: None

Roy Lutchmeeput
Singh

APPELLANT

Vs

Assamathem Nessa
Bibee

RESPONDENT

Date of Decision: May 13, 1878

Citation: (1879) ILR (Cal) 142

Hon'ble Judges: Richard Garth, C.J; Markby, J; Kemp, J; Jackson, J; Ainslie, J

Bench: Full Bench

Judgement

Richard Garth, C.J.

I am of opinion that the property in question did not pass to the defendant under the sales made by the Sheriff.

2. It may be, that if the suit instituted by the Land Mortgage Bank on the 10th of May 1872 had been brought in proper form, and if the proceedings in that suit had been conducted to a conclusion in the regular course of law, the decree might have been binding upon Suddurunnessa, and this property might legally have been sold under that decree; but in point of fact, the suit was brought advisedly against certain other persons as the representatives of Buzloor Rohim, expressly excluding the name of Fatimatunnessa, upon the ground that she had sold her share of the deceased's property to her daughter Surfunnessa; and omitting all mention of Suddurunnessa and her share, although the plaintiff in the suit knew perfectly well that she was entitled to a share, and they had reason to believe that she was alive at Medina. A decree was then passed in that suit, not adversely to the defendant, or in the usual course of proof and procedure, but by consent, a decree by no means of an ordinary character, and which the Court, except by consent would clearly not have been justified in making. This decree, which was passed in the Court of the 24-Pargannas, professed to charge the property in question (which was situate in Calcutta, and therefore beyond the jurisdiction of the Court), with the payment of

the mortgage debt and interest; and it contained provisions for sale of the property by private contract, for delaying of execution, and as to the rate of interest, which could not have been effected, except by private arrangement. The amount of the mortgage money and interest not having been realized in the 24-Pargannas under this decree, it was transferred to this Court to be executed upon the property in Calcutta; and it appears that, under certain sales by the Sheriff and certificates issued by the Court in accordance with those sales, the right, title, and interest, not only of the defendant who consented to the decree, but also of the deceased Buzloor Rohim, was professedly purchased by the present appellant. The question, however, of what legally passed by these sales cannot depend altogether upon the form of the sale certificates, because if this Court, professing to act under that decree, directed property to be sold, the sale of which the decree did not warrant, it is clear that the sale, *pro tanto*, might be set aside in a regular suit. No order of this Court could enlarge the rights of the plaintiff under the decree, nor could the form of the certificates confer upon the purchaser at the sales a property which the Court had no right to dispose of.

3. The question, therefore, comes back to this: whether the decree, which was thus obtained, affected the share of Suddurunnessa, who was not a consenting party to it; and this question must, in my opinion, be determined by the Mahomedan law, so far as that law upon the subject can be ascertained. It was strongly urged upon us by Mr. Jackson, on behalf of the appellant, that as the whole of the Immovable property of Buzloor Rohim was in the possession of the defendants in the above suit, those defendants by Mahomedan law represented the entire estate of Buzloor Rohim, and the decree against them bound the share of Suddurunnessa, as well as their own shares, and in support of that construction, he relied upon the following passages from the Hedaya:

4. In Bk. xx, chap. 4 (relating to the duties of the kazee), it is said: "Any one of the heirs of a deceased person stands as litigant on behalf of all the others, with respect to anything due to or by the deceased, whether it be debt or substance, &c." To this it is objected. "If an heir be litigant on behalf of the others, it would follow that each creditor is entitled to have recourse to him for payment of his demand whereas according to law, each is only obliged to pay his own share" Reply: "The creditors are entitled to have recourse to one of several heirs only in a case where all the effects are in the hands of that heir. This is what is stated in the Jama Kahem, and the reason of it is, that although any one of the heirs may act as plaintiff in a case in behalf of the others, yet he cannot act as defendant on their behalf, unless the whole of the effects be in his possession." Assuming that these passages do establish that, by the Mahomedan law, if the whole of the Immovable property of a deceased debtor be in the hands of one of his heirs, that heir may be sued by a creditor as representing the entire estate, and that a decree obtained against him would be binding as against the other heirs, it does not appear from the text of the Hedaya how far the rule thus laid down would be applicable in the case of a suit

brought against two or more of several heirs who may be in possession of the property, nor whether the heir who is sued should be expressly charged as representing the whole estate of the deceased, nor whether the absent heirs should be mentioned in the proceedings.

5. But it appears clear from another passage in the Hedaya, to which our attention has also been called, that an absentee heir would certainly not be bound by a decree obtained in such a suit, unless the proceedings are duly conducted, and the plaintiff's case proved in open Court; and that a decree by consent of the heir who is sued would not be binding on the other heirs. In Bk. xxxix, chap. 1, on the subject of partition, it is said; "As where a man sues for a debt against an estate, and an heir or executor acknowledges his claim, in which case such acknowledgment, as being to the detriment of the others, is not sufficient, but the claimant must produce evidence before the Kazee in his suit even against that heir or executor before he can establish his claim against the estate in general to the prejudice of the other heirs." This appears to me a direct authority, that a decree by consent against one heir of a deceased debtor cannot legally bind the other heirs; and this rule is founded on the most manifest justice; because, although, for the sake of convenience, the share of an absentee heir may be bound by proceedings taken in open Court and in due course of law, as in such case the presence and sanction of the Judge, and the public nature of the proceeding, operates as a protection to the absentee, and as a guarantee for the bona fides and justice of the decree itself, it is obviously very different in the case of a decree made merely by consent, because there the absentee is entirely at the mercy of the consenting party, and there is no security whatever, either for the justice of the decree, or for the protection of the absent heir from any fraud or collusion, which may be practised against him.

6. It was suggested in answer to this argument that, in the case with which we are dealing, the proof of the creditor's debt would be easy and almost a matter of form; but it would be extremely dangerous for us, in my opinion, to allow any consideration of this kind to operate as an exception to the above rule. If we did so, it would be necessary in each case to enquire, not merely whether the decree was obtained by consent or in due course of law; but whether, if obtained by consent, the proof of the case would have been easy or difficult, and in point of fact to go into the evidence in each instance ourselves for the purpose of ascertaining how far the consent was justifiable. Besides, there is no doubt whatever, as I observed before, that in this particular case the decree which was obtained was irregular, and one which in due course of law the Judge could have no right whatever to make.

7. I am of opinion, therefore, that this decree and the execution founded upon it did not affect the share of Suddurunnessa in the estate of the deceased; and consequently that the property in question did not pass under the sales made by the Sheriff. Deciding this question upon what I believe to be the Mahomedan law as applicable to the circumstance of the case, I do not consider it necessary to discuss

the various authorities to which our attention has been directed, many of which are, no doubt, very difficult to reconcile with one another. The case will go back to the Division Bench for ultimate disposal.

Markby, J.

8. The question referred to us in this case is, whether, under the circumstances stated in the inference, certain property consisting of a share in two houses situate in Calcutta passed to the person who is appellant in the appeal in which the reference is made. Although I am compelled by the nature of the question referred and the arguments addressed to us to go into the consideration of general principles, I desire it to be understood that I base my judgment ultimately upon the circumstances stated in the reference, and which must be taken, therefore, as incorporated in this judgment.

9. It was contended for the appellant, that he was entitled to have the question put, to us answered in the affirmative, upon the simple ground that the decree in execution of which he purchased the property referred to was obtained in a suit which, under the Mahomedan law, was rightly framed.

10. In order to arrive at any satisfactory conclusion upon this point, it appears to me necessary to consider what are the general principles of Mahomedan law in reference to the recovery of debts out of the estate of a deceased person.

11. Under the Mahomedan law, taking that law as stated in the Hedaya, it is, I think, clear that the estate of an intestate descends entire, together with all the debts due from and owing to the deceased; that it is, therefore, to use a convenient expression adopted by lawyers, a universal succession. I also think that, strictly speaking, there ought, according to the Mahomedan law, to be in every case of death something very similar to what we should call an administration of the estate by a Court of Justice,—that is to say, liquidation of the estate under the superintendence of the Kajee, followed by a partition of the residue. It seems, however, that a liquidation and a partition out of Court was to some extent recognized even by the strict Mahomedan law. Of course, if there were a complete liquidation of the estate by a Court of Justice, there would be no question of any personal liability of the heirs; but if there were no such liquidation, or such liquidation were incomplete, the heirs upon taking possession then, each became liable to pay his own share of the debt. I need not now consider whether, under the true Mahomedan law, this liability was proportionate, hereditaria or proportionate emolumenti. But whichever it was, this liability of the individual heirs was, as I understand it, something quite distinct from what I may call (to use an English expression) "the liability of the estate."

12. [also think it clear that, under the strict Mahomedan law, "the liability of the estate" remained, if the creditors chose to resort to that remedy, until the debts had been completely liquidated, though the Court would, of course, avoid disturbing old-standing arrangements if the creditor could be satisfied in any other way. if this

be so, it follows, I think, that on the decease of a Mahomedan, neither his estate vested immediately in his heirs, nor did his heirs become immediately liable to his debts. Until the heirs came forward to take possession, the succession was vacant (*hereditas jacens*). But by a fiction the deceased owner was supposed, during this interval, to be represented by the estate itself (*quia creditum est hereditatem dominam esse et defuncti locum obtinere*) (Pand. xxviii, 5, 31,  1). It is particularly to be observed, however, that it was the deceased owner and not the heirs who were thus represented (*personae vicem sustinet non heredis futuri sed defuncti*) (Just. ii, 14,  2). For many purposes this fiction was enough. Still there were some transactions which could not be deferred, and for which the action and judgment of a responsible person were necessary. For the conduct of such transactions various expedients have been devised. Roman lawyers considered that a slave of the deceased owner, who himself belonged to the estate, would answer the purpose. Very frequently a special person had been appointed as an *ad interim* curator or manager of the estate. Under the Mahomedan law it appears to me that in such transactions one or more of the heirs themselves were the proper persons to represent the deceased.

13. These I consider to be the general principles of the strict Mahomedan law of succession so far as they relate to the matter now under consideration. Of course, to arrive at them, we must consider the Mahomedan law generally, as to which I have only somewhat imperfect information. But the texts upon which I especially rely are those passages of the *Hedaya* which were quoted in the argument in this case, namely, Vol. II, pp. 654, 599; Vol. III, pp. 164, 209; Vol. IV, pp. 6, 539, 530 (edn. 1791).

14. If I have correctly gathered the principles of the Mahomedan law from these texts, they are part of that Mahomedan law of succession which our Courts are bound to administer, except so far as they have fallen into disuse, or have been modified by custom or by legislation. I may also observe that these principles are rational in spirit, and they are probably derived from the very same source as the general law of Europe on the subject of succession, with which they are, in the main, identical. It is to show this identity, and also to enable me to express my meaning with greater clearness and precision, that I have quoted here and there the familiar and accurate expressions of the Roman law upon this subject.

15. The administration of the estate by the *Kazee* has fallen into disuse, and the creditor must, therefore, if he wishes to enforce his entire claim, enforce it against the estate in some suit properly framed for the purpose. There are some passages of the *Hedaya*, which might almost seem to lead to the inference that any one of the heirs, whether in possession of the estate or not, may be made defendant in a suit brought to charge the estate. I think, however, that at the present day there would be danger of collusion, such as the Courts might be unable to detect, if a person who was interested only to an insignificant extent could be made the sole defendant in a suit to establish a claim against the estate. Probably, therefore, our Courts

would at least require that the estate should be substantially represented. This, however, is a matter to which I only refer by way of precaution, for in the suit which the Land Mortgage Bank brought against the representative of Buzloor Rohim, the estate was substantially represented. The persons sued were in possession, if not of the whole of the estate of the deceased, at least of that part of it which the Land Mortgage Bank sought to make liable for their debt; nor is there the least suspicion of collusion. If, therefore, we are to apply the principles of the Mohamedan law at all, I think it impossible to say that a suit brought to enforce claim against the estate of a deceased person is improperly framed when all the persons who are in possession of that particular portion of the estate which it is intended to charge are made parties to the suit.

16. So far, therefore, as the frame of the suit is concerned, I think that no valid objection can be taken to it. But even admitting this to be a correct view of the Mahomedan law, there is still an objection to the decree of the District Judge of the 24 Pargannas, in execution of which this property was sold, and one which arises out of the Mahomedan law itself. This decree was a decree given by consent of parties, and one of the passages I have quoted above shows that a decree to establish a claim against the estate ought not, under any circumstances, to be made by consent, for the obvious reasons that the very object of bringing the suit in that form is to bind the estate; in other words, to bind absent persons.

17. If, therefore, the question which we had now to determine was whether, as between the Land Mortgage Bank and Suddurunnessa, the decree of the District Judge of the 24-Pargannas could be impeached by the latter, I should certainly have very great difficulty in answering this objection. Moreover, viewed as a question between the Land Mortgage Bank and Suddurunnessa, there is this additional difficulty. It appears that, knowing as they did that there had been a daughter, Suddurunnessa, and it being doubtful whether she was alive or dead, the Bank suppressed from their plaint all mention of her when they took upon themselves to inform the District Judge of the 24-Pargannas who the representatives of Buzloor Rohim were. There can be no doubt that the effect of this might be to lead the Court to suppose that all persons interested in the estate were before it and consented to the decree. This would not, strictly speaking justify the Court in establishing a claim against the estate without further evidence, as pointed out in the Hedaya in one of the passages above referred to. But still the Bank ought not to have made this statement; and, though it was very likely made without any wrong intention, it would seriously embarrass the Bank if they were now insisting upon the decree. But this is not a suit by the Land Mortgage Bank, nor are the Land Mortgage Bank in any way now seeking to enforce their decree. The suit is brought by one of the heirs of Buzloor Rohim against the defendant to recover property sold to him under an order of this Court, for a debt to discharge which that property was undoubtedly liable. In order, therefore, to decide this case, it seems to me necessary to go somewhat further and to consider what is the position of an heir in this country who

comes forward to claim property which belonged to his deceased ancestor, and which has been sold in payment of the ancestor's debt.

18. It is clear from the principles of the Mahomedan law stated in the earlier part of this judgment that the right of an heir claiming the property of his deceased ancestor, who died indebted, is a right of representation only, and, except as representative, he has no right to the property whatsoever. The question before us, therefore, at the very outset, assumes a special form. It is not the simple case of an owner of property asserting his undisputed rights of ownership, but of an heir asserting his undisputed rights of representation. I think it impossible to deny, after the decisions to which I am about to advert, that under the law of this country there is between these two questions a very solid distinction.

19. The first case to which I desire to advert is one which was not quoted in the argument. It is reported in 3 Sel. Rep., 93. In that case one Lukhee Khwaree was supposed to be the proprietor of a revenue-paying estate. Whilst she was in possession, she borrowed money from the plaintiff to pay the Government revenue. It was shown that with this money the revenue was paid. The first Court found these facts, and also that the plaintiff bona fide advanced the money in the belief that Lukhee Khwaree was the proprietor. There was no allegation that the estate was in difficulties or in danger of being sold, or that the income was insufficient to meet the Government revenue; but I take it that the money was borrowed in due course of management. Subsequently, it was discovered that the true owner of the property was one Surruswuttee Debia; and the plaintiff then sued both Lukhee Khwaree and Surruswuttee to recover the amount lent by him. The ultimate decree was that the plaintiff should recover the amount from one or other of the defendants, or from both of them; and that, if the debt was not liquidated, the estate should be sold in satisfaction of the debt. This decree, though loosely drawn, is perfectly intelligible upon the principle that the estate *persona vicem defuncti non haredis futuri sustinet*, and that Lukhee Khwaree was taken to have been acting as an *ad interim* manager of the estate representing the deceased. That the decision was substantially right cannot now be disputed, as it has been cited with approval by the Privy Council in the case of *Hunooman Persaud Pandey v. Mussamut Koonwaree* (6 Moore's I.A., 393, at p. 413).

20. The case of *Hunooman Persaud Pandey* (6 Moores I.A., 393 also hears upon the present question in one of its aspects. A Hindu possessed of landed estate died indebted. After his death his widow got herself registered as co-proprietor with her infant son, and assumed possession of the estate. Whilst in possession she borrowed various sums of money, partly to pay off old debts, partly to pay revenue, and partly for purposes not stated: but all, apparently, in due course of management, had she in fact been managing on behalf of another. The Sudder Court of Agra thought that she did in fact borrow as proprietor and not as manager, and upon this ground, when the son came of age, gave him a decree, the general

effect of which was to set aside all the transactions of the mother. The Privy Council differed from the Sadder Court in the view which they took of these transactions, and thought that the acts of the widow ought properly to be viewed as acts done by her as manager on behalf of another. They made, however, these observations upon the law as applicable to the facts found by the Sudder Court: "It is to be observed," they say, "that, under the Hindu Law, the right of a bona fide incumbrancer who has taken from a de facto manager a charge on lands created honestly for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with the de jure title. Therefore, had the Ranee entered into the estate wrongfully, and even practised a deception upon the Court of Wards, or the Collector exercising the powers of a Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the wardship, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then, to the Ranee's assumption of proprietorship in order to get the management into her hands does not really go to the root of the matter, nor necessarily invalidate the charge. Consequently, even had the view which the Sudder Dewany Adawlut took of the character of the Ranee's act, as not having been done by her as guardian, been correct, their decision against the charge without further enquiry would not have been well founded. It would not have been accordant with the principles of the Hindu law as declared in Colebrook's Digest, Vol. 1, p. 302, and in the case of *Gopee Churn Burrall v. Mussamut Lukhee Ishwuree Dibia* (3 Sel., Rep., 93), and as illustrated by the case cited for the appellant in the argument against the authority of which no opposing decision was cited."

21. It does not seem to me that these observations were intended only to apply to the case where the true owner of the estate is an infant. The language is general, and there is, as far as I can see, no reason why the acts of a de facto manager should be valid when they are done on behalf of an infant, and invalid when they are done on behalf of a person who is sui juris. The de facto manager who is not so de jure is, after all, no more than a party in possession under a supposed title, and I take the Privy Council observations, which I have above quoted, to be in spirit, as they are in language, generally applicable.

22. The next case is the well-known one of *Ishan Chunder Mitter v. Buksh Ali Soudagur* (Marsh., 614). There, during the minority of the plaintiff, and after the death of his father Juggomohun, a creditor of the father sued the plaintiff's mother, Shoobatra, as widow of Juggomohun, and recovered a decree. Under that decree a portion of the estate of Juggomohun was sold to the defendant. Plaintiff brought this suit to recover this property, alleging that only the widow's interest, if she had any, passed by the sale. There were obviously here two questions for consideration: first, what was in fact sold, the widow's interest only, or that of Juggomohun? and, secondly, whether, even if it were intended to sell the interest of Juggomohun, the

proceedings in the suit were effectual for the purpose? It is with the latter only that we are concerned now, and Sir Barnes Peacock disposed of it in these words: "If the parties who went to that auction had referred to the decree, they would have found that the debt for which the sale was to take place was not the widow's but Juggomohun's, and that the property to be sold under the decree was not the widow's but Juggomohun's, because Juggomohun was really the debtor, and the widow was sued merely in her representative character"; and he then refers to Section 203 of Act VIII of 1859 as supporting that view of the law. It is clear to me, therefore, that Sir Barnes Peacock thought that a proceeding against the widow as representative of her husband may be an effectual proceeding against the husband's estate, notwithstanding that the widow is not the heir to the estate of her husband. A passage from another report (W.R., Spl. No. 119) of the same case has been relied on as showing that in this case the son was, in fact, a party to the suit, and that the mother appeared not as defendant, but as his guardian. I can only say that if it were so, it was overlooked by Sir Barnes Peacock, as well as by the defendant himself, who expressly said in his defence that the suit was brought against the widow. (See the statement of the case by Sir Barnes Peacock.) Anyhow I think Sir Barnes Peacock's judgment proceeds upon the assumption that the mother was a party to the suit, and that the son was not.

23. The next case is of *Hukeem Bibee v. Khoja Gowkur Ali* (5 Wym., 27). There A, a Mahomedan, died, leaving two sons, If (supposed to be illegitimate) and C, and also a widow D. D died, and then the heirs of D sued D and some other persons, not including B, to recover the dower due to D. In the first instance, a decree was made against the estate. This was subsequently modified, and a decree was made directing some of the defendants to pay the dower, not out of the estate generally, but out of certain assets of the deceased which had come to their hands subsequently. B proved his legitimacy and got into possession of some part of the property of the deceased, and the heirs of D then sought to execute their decree, as modified, against the property of the deceased in the possession of B. This Court (KEMP and Glover JJ.) said that, if the original decree had remained unamended, the plaintiff would undoubtedly have been entitled to follow the estate which under that decree was charged with the payment of the dower of D, in whosoever's hands that estate might be. But under the modified decree certain parties who were named, and amongst whom the name of B did not appear, were made liable to satisfy the decree, and the estate of the deceased was not made liable.

24. The next case is that of *Rajkristo Singh v. Bungshee Mohun Baboo* (14 W.R., 448, note). There certain creditors of the ancestor brought a suit against the person who alleged himself to be the heir, and who, as such, was then in possession of the estate, and they obtained a decree against him, by which it was ordered that the property of the ancestor should be sold in satisfaction of the debt. But when this suit was brought, proceedings had been already commenced by one Rajkishen Singh, who claimed to be the true heir, to recover the estate; and before the decree of the

creditor was executed, the property had actually passed into the hands of Rajkishen. The matter was twice before the High Court. On the first occasion the Court thought that the decree had made the estate liable for the debt, and ordered the estate in the hands of Rajkishen to be sold under it. But no sale took place, and in a subsequent regular suit Rajkishen Singh succeeded in setting this order aside, and in obtaining a declaration that the estate was not liable.

25. The next case is that before Bayley and Paul, JJ., *Sham Coomar Roy v. Jutton Bibee* (14 W.R. 448). There, as is very frequently the case, the parties who had obtained a certificate under Act XXVII of 1860, authorizing them to collect debts due to the deceased, had under colour of that certificate obtained possession of the whole estate. A creditor of the deceased sued the parties so in possession, got a decree, and sold a portion of the estate to the plaintiff. The plaintiff then brought a suit against one of the heirs of the deceased, who had subsequently established her right to that portion of the estate, and got into possession. The suit was dismissed in the Courts below, and this Court upheld the decision in special appeal. I may observe that the learned Judges base their judgment upon the two cases I have last quoted; but, with great deference, neither of those two cases are in point, as appears from the statement I have given. The case in Wyman's Reports shows clearly that the learned Judges who decided it thought that a suit against the party actually in possession, in which a decree was given against the estate, also binds the estate into whosoever's hands the estate might come. In the other case, the creditors in the course of their proceedings were warned that they were suing a party who was a stranger to the estate, and who was no longer in possession of it; but they nevertheless thought fit to proceed.

26. The next case is that of *Court of Wards v. Maharajah Coomar Ramaput Singh* (10 B.L.R., 294; 14 Moores I.A. 605), a decision of the Privy Council.

27. That was a very peculiar case. A creditor sued a minor and his mother for a debt of the minor's father. The defence of the minor was that he had been adopted into another family, and consequently the creditor got a decree against the mother only, it being declared that the son was not liable, and that the debt was to be paid out of the estate of the deceased. Subsequently the creditor established in another proceeding that the son was really the heir of his natural father, and had not been given in adoption; and he then proceeded to execute his decree against the estate. It was held that the interest of the son passed by the sale. The decision is not, perhaps, strictly in point, but it is valuable for the present purpose, in consequence of the Privy Council having expressed their entire concurrence in the principles laid down by Peacock C.J., in the case of *Ishan Chunder Mitter v. Buksh Ali Soudagar* (Marsh. 614 W.R.119).

28. The next case is *Girdharee Lall v. Kantoo Lall* (14 B.L.R. 187 : 22 W.R. 56), also a decision of the Privy Council. There one Mudden Thakoor purchased, in execution of a decree obtained against two persons, a property belonging to their family. The

family was governed by the Mitakshara law, and one of the two persons had, when the sale took place, an infant son living; the other had no son at the time, but one was born afterwards. The question was whether the interest of the son who was alive when the proceedings took place passed by the sale. The Privy Council say:

29. It appears that Mudden Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers: that a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for the particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case, which has already been referred to, of Hunooman Persaud Pandey (6 Moores I.A. 393), in purchasing the property, and paying the purchase-money bona fide for the purchase of the estate." And further on it is said: "A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree if the decree had been given properly against them; and having inquired into that, and having bona fide purchased the estate under the execution, and bona fide paid a valuable consideration for the property, the plaintiff is not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant."

30. This appears to me a very important decision, and it was not quoted in the argument. It is to be observed that the suit in which the property was sold in this case was wrongly framed, in that the infant son was not a party thereto. It is clear that no suit to recover a debt from the family by a sale of the family property could be rightly framed in which he was not a party. This appears from a later decision of the Privy Council in the case of Deen Dyal Lal v. Jugdeep Narain Singh (I.L.R. 3 Cal. 198).

31. The next case is Lalla Seeta Ram v. Ram Buksh Thakoor (24 W.R. 383). There a man died leaving three sons. After his death two of them were sued as his representatives for a debt which he had incurred. A decree was obtained, and property belonging to the ancestor was seized and sold in execution of that decree. The son who had not been sued, then brought a suit against the execution purchasers to recover the property sold, alleging that his share did not pass by the execution-sale. The parties were Hindus, and there is not, as far as I am aware, any special rule in the Hindu law analogous to the rule of Mahomedan law which enables some of the heirs to represent the estate. The suit was, therefore, not

rightly framed. The learned Judges, however, having first expressed their opinion that the decree was intended, not as a personal decree against the two sons, but as a decree for the debt of the ancestor to be satisfied out of the ancestor's estate, went on to say that this being so, they thought that *prima facie* they ought to hold that what was sold was the property of the ancestor, including the share of the absent party. "It is true," they say, that the plaintiff, not having been made defendant in that case, is not precluded from showing, if he can do so, that what was understood by the bidders to have been sold was not the whole of the rights and interests of Durga Thakoor, but only the right, title, and interest of the two sons who were made defendants; and also the plaintiff" can show that it was a collusive decree, and that he, not having been made a defendant in that action, had no opportunity to show that the plaintiff in that case was not entitled to the decree which was passed. But there are facts which he must allege and prove; and in this case we do not find that any such allegations were made."

32. These are all the cases to which I think it necessary to refer, and these being the authorities from which I have to derive the law upon this subject, let us now see what are the grounds upon which the plaintiff seeks to recover this property. He claims to have purchased the interests of Suddurunnessa: neither he nor she has ever been in possession, and he can only therefore assert her rights as representative of Buzloor Rohim. This he does simply by stating in the 6th paragraph of the plaint that she, as one of the heirs of Buzloor Rohim, was entitled to a six-anna share of the property sold to the appellant; that such six-anna share did not pass by the sale in execution; and that, notwithstanding the sale in execution, it remained vested in her. There is no allegation of fraud or mismanagement, or that the debt for which the property was sold was not due. The plaintiff's claim proceeds upon the view that the existence of the debt to the Land Mortgage Bank, and the proceedings by which that debt have been satisfied, are no impediment whatever to his immediate and unconditional recovery of Suddurunnessa's share in the property.

33. Upon a consideration of all the cases which I have above referred to, I cannot take this view of the plaintiffs position. I think the cases above cited, upon the whole, show that in this country proceedings to recover a debt due by the ancestor, taken against a person who is not the true or sole heir, may nevertheless, under some circumstances, bind the estate; and if once this be admitted, it is evident that the broad and general proposition upon which the plaintiff seeks to recover in this suit cannot be maintained. It is not enough in this case to say Suddurunnessa was an heiress of the deceased, and that she was no party to the suit in the 24-Pargannas in which the property was sold. We must go further and see whether, that being a proceeding, the simple result of which was that the property of the deceased was sold and applied in payment of his debts, that sale does not bind her quite as fully as if the suit had been unimpeachable in point of regularity, or as if she had been a party thereto. In my opinion, considering that the parties sued were in

possession of the property which was ultimately sold, that that property was mortgaged by the ancestor for this very debt, and that the estate was properly and duly applied to the payment of the debt for which it was mortgaged. Suddurunnessa, as one of the representatives, was bound by those proceedings just as much as those representatives who were actually parties thereto. In holding this, I think I am keeping well within the authorities which are binding upon this Bench, some of which appear to me to proceed upon grounds even somewhat more general. It is true that most of the cases I have referred to are cases in which the Hindu and not the Mahomedan law had to be applied; but it seems to me that this, if a difference at all, is in favour of the appellant. The Mahomedan law lays down more clearly than the Hindu law the liability of the estate as distinguished from any personal liability of the individual heirs. I do not for a moment say that under Hindu law the estate is not liable, but in the text of the Mahomedan law the liability of the estate is more clearly expressed.

34. I also think that this view of the law is supported by Section 203 of the former Code of Procedure (Section 252 of the new Code). That section provides: "If the decree be against a party as the representatives of the deceased person, and such decree be for money to be paid out of the property of the deceased person, it may be executed by the attachment and sale of any such property; or if no such property can be found, and the defendant fail to satisfy the Court that he has duly applied such property of the deceased as shall be proved to have come into his possession, the decree may be executed against the defendant to the extent of the property not duly applied by him in the same manner as if the decree had been against the defendant personally." Sir Barnes Peacock thought that section applicable to a case where a widow, who was not the heir, was sued as the representative of her husband. This shows that a person may be a representative within the meaning of this section, so as to make the decree effectual for the purpose therein stated, although that person is not the heir.

35. It is also said that the decree of the District Judge of the 24-Pargannas and the order of this Court directing the property to be sold were both irregular and wrong. No doubt the District Judge of the 24-Pargannas had no power to grant a decree directing the sale of property in Calcutta; but if that part of the order were struck out, and the decree stood as a decree for the debt alone against the representatives, this decree would be properly executed by sending it to this Court for execution; and having regard to the provisions of Section 203 of the Code of Civil Procedure, Mr. Justice Phear would be right in ordering that decree be executed against the property of the deceased in Calcutta. If, therefore, there has been any error in attempting to enforce a mortgage of Calcutta property by a mofussil decree, that error is wholly immaterial, for there being no mesne incumbrances the appellant would stand in just as good a position as if there were no mortgage at all. Indeed, I go further. The cases I have quoted appear to me to show that if the parties in possession had, without the consent of Suddurunnessa, by a voluntary

arrangement sold the estate to the appellant, in order to pay off the mortgage debt, that sale would not have been void in respect of Suddurnnessa's share, provided that the purchaser was without notice of Suddurunnessa's claim, or that there was no reasonable means of getting her concurrence.

36. It may be said that the result of this judgment is to give to the appellant the benefit of the Mahomedan law, and to absolve him from its express restrictions; but I do not think that this is really so. I have said that the District Judge was wrong in giving a decree by consent, but I do not think it follows as a necessary consequence that that error vitiated the sale as against a purchaser in execution of the decree. The true effect of the arrangement consented to was to substitute for the decree, which was irresistible, an arrangement for postponing the sale which parties then in possession of the estate thought to be advantageous to those interested, and, which is not shown to have been otherwise. It may be that on this ground Suddurunnessa could have come in and insisted on setting aside the decree. But it does not follow that because Suddurunnessa might have insisted on setting aside the decree that the sale is as against her a void proceeding; nor if the decree were set aside would it necessarily follow that the appellant's purchase under it would be thereby avoided also. There are many cases in which, when a decree is set aside, a sale in execution of it will still hold good: *Jan Ali v. Jan Ali Chowdhry* (1 B.L.R. A.C. 56); *Jugal Kishore Banerjee v. Abhaya Charan Sarma* (1 B.L.R. A.C. 84); and *Pearee Monee Dossee v. The Collector of Beerbhoom* (8 W.R. 300).

37. But I need not consider what would be the effect of setting the decree aside; or whether the respondent has any other right than that which he has set up in the present case. I desire to decide no more than under the reference we are actually bound to decide, and I, therefore, answer the question in the terms in which it is put to us, that the property to which this suit relates did, under the circumstances stated in the case, pass to the appellant.

Ainslie, J.

38. I am of the same opinion.