

Confidential.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chowdry Wahed Ali v. Mussumat Jumace, from the High Court of Judicature at Fort William in Bengal ; delivered 14th June 1872.

Present :

SIR JAMES W. COLVILLE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS was an appeal from the judgment of a full bench of the High Court at Calcutta, affirming a decision of the Principal Sudder Ameen of Patna in favour of the Respondent, the Plaintiff in the suit below.

The suit was brought by Mussumat Jumaec, the Respondent, to obtain a declaration that an execution sale of certain mouzahs under colour of a decree made in a former suit brought against her and others by the Appellant should be set aside, and her possession of the mouzahs confirmed.

It may be convenient to designate the former suit, which led to the sale complained of, as suit A. Suit A. was itself the sequel of a protracted litigation, and became in its turn the starting point of new and intricate proceedings.

The Appellant, who was mortgagee of mouzah Mayjara, had obtained decrees in suits against his mortgagors for the mortgage debt under which he attached their interest in that mouzah. Waris Ali, the father of the Respondent and the Respondent and other persons intervened, claiming interests in the mouzah. Waris Ali claimed to have advanced money to the mortgagors under certain bhurnanamas. The

Respondent's claim was distinct. She was married to Enayet Ali, and she claimed certain shares of the mouzah under a purchase made previous to the Appellant's mortgage. Notwithstanding these claims the mouzah was sold under the Appellant's decrees, and purchased by him. Being unable to obtain possession of the mouzah the Appellant brought suit A. to recover it, making Waris Ali and the Respondent and other persons (in all 103) Defendants, charging them with combining to keep him out of possession.

Waris Ali set up his claim under the bhurnana-mahs, which was ultimately held to be invalid. The Respondent, however, established her title to the shares of the mouzah she claimed. During the pendency of suit A., viz., in January 1856, Waris Ali died, and thereupon, under the 104th section of Act VIII., his heirs, viz., the Respondent and her brother and sister, were entered in the register as Defendants in his place. Thus the Respondent became a party to the suit in a double capacity, which led to the confusion in the proceedings to be presently noticed.

On the 29th November 1861 the Judge of Patna made a decree in favour of the Appellant for possession, and "for mesne profits to be charged on the Defendants jointly and separately." Although the Judge had stated in his judgment that the title of the Respondent to the share she claimed was proved, and therefore ought to have decreed to that extent in her favour, his decree does not so find, nor does it separate her from the other Defendants in the award of possession and mesne profits against them.

This ill-advised and erroneous decree in suit A. was the origin of a labyrinth of intricate and too often irregular proceedings, through which it is not easy to find the way to a definite end.

The Respondent Jumace, amongst others, appealed against it to the High Court. On the 10th July 1863 that court gave judgment (p. 61) to the effect, that it having been adjudged

by the judge at Patna, that Jumae had a good title as purchaser to the share of the mouzah claimed by her, she was needlessly made a party to the suit, and it was ordered that she should be released from it, with costs.

This judgment undoubtedly went too far in releasing Jumae altogether from suit A., as her learned counsel, Mr. Cowie, fairly admitted; because the grounds on which it proceeded do not touch her liability in her representative capacity as one of the heirs of Waris Ali; but apparently the decree stands unreversed; a circumstance which it is material to bear in mind.

Although no attempt appears to have been made to review or alter this decree, proceedings, now to be noticed, were taken, by force of which the sale (sought to be set aside in the present suit) of Jumae's private estate to the Appellant, as purchaser under his own decree, took place. They are succinctly described by the Chief Justice in the following extract from the judgment now under appeal:—

“ On the 17th August 1863, Wahed Ali, the
 “ then plaintiff, applied to the court at Patna to
 “ execute the decree which he had obtained for
 “ mesne profits. Jumae, the present Plaintiff,
 “ appeared upon that application and urged, that
 “ according to the decree of the High Court of
 “ the 10th of July 1863, she had been wholly
 “ discharged from liability. Wahed Ali admitted
 “ that she had been discharged by that decree so
 “ far as her private interests were concerned, but
 “ contended that she remained liable as one of
 “ the heirs of Waris Ali. The Judge of Patna
 “ took that view of the case, and on the 5th
 “ October 1863, ordered a sale of that part of the
 “ property which belonged to her own right, and
 “ which had been attached in execution of the
 “ decree. On the 7th of October 1863, the Plain-
 “ tiff petitioned the Judge, contending that even
 “ if she were liable as heiress of her father, she
 “ could only be liable under sections 203 and 211

“ of Act VIII. of 1859, to the extent of assets
“ inherited from him. On the same day the
“ Judge ordered the petition to be rejected; and,
“ on the following day, the 8th of October 1863,
“ the Plaintiff’s own portion of the property which
“ had been attached under the execution against
“ her in her representative capacity, was sold
“ under the execution, and Wahed Ali, who was
“ then the Plaintiff in the suit, became the pur-
“ chaser under his own decree. Numerous other
“ proceedings took place to which it is not neces-
“ sary to refer. It is sufficient to say that on the
“ 15th of March 1864, the Judge confirmed the
“ sale.

“ The present Plaintiff petitioned the High
“ Court against the order for execution and the
“ sale of her property; and, on the 8th of July
“ 1864, the High Court ordered that the decree
“ of the 5th of October 1863 should be amended
“ by declaring that the present Plaintiff was only
“ liable to the extent of assets inherited from her
“ father, so that, in fact, the order under which
“ the Plaintiff’s private property was sold in
“ execution was so far altered that it did not
“ justify the sale which took place under it on
“ the 8th October 1863.

“ The Plaintiff again appealed to the High
“ Court against the order of the 15th of March
“ 1864, confirming the sale under the execution;
“ and, on the 30th of January 1865, the court
“ declared that the sale could hold good only if
“ the Plaintiff had received assets from her
“ father’s estate, and in that case only to the
“ extent of the assets so received. The case was
“ therefore remanded to the Judge to make in-
“ quiry upon that point. The Judge upon that
“ remand found that the Plaintiff had inherited
“ nothing from her father, and, on the 27th of
“ May 1865, set aside the confirmation of the
“ sale.

“ From that order Wahed Ali appealed to the
“ High Court; and, on the 18th September 1865,

“ a division bench held that as the sale had been
 “ confirmed, there was no power to cancel it ;
 “ that the two orders of the 8th of July 1864 and
 “ the 30th of January 1865 were wrong, and they
 “ advised Wahed Ali to apply to the High Court
 “ for a review of the order of the 30th of January
 “ 1865. Wahed Ali acted upon that advice, and
 “ applied for a review of the judgment of the
 “ 30th of January 1865, and, on the 23th of
 “ September 1866, the division bench held that
 “ the sale could not be set aside except by a suit
 “ by the present Plaintiff in the Civil Court.
 “ They amended the order of the High Court of
 “ the 30th of January 1865, and the order of the
 “ Judge of the 27th May 1865, and restored and
 “ confirmed the Judge’s order of the 15th of
 “ March 1864, by which the sale had been con-
 “ firmed.”

The above summary seems to be in substance correct, except that the order of the 8th July 1864 appears to be, technically, not an order to amend the decree, but to declare in the execution proceedings what was the limit of Jumace’s liability under it.

The result, so far as a result can be extricated from these involved and contradictory proceedings, appears to be, that whilst the High Court held the sale of Jumace’s private property to be utterly wrong, and at first ordered it to be set aside, they, in the end, reversed their own orders, on formal grounds, leaving the order for sale and confirmation to stand, but suggesting to Jumace to obtain redress by a new suit.

Accordingly, she brought the present suit and obtained the concurrent judgments of the Courts of India in her favour, which the Appellant now seeks to reverse : 1st, on the merits ; and, 2nd, on the ground that it was not competent to the Respondent to bring this suit.

On the merits it was at first contended that she was personally liable in suit A. for having acted in concert with the other Defendants to disturb the Appellant’s possession. Their Lordships,

however, think that not only is this liability unsustained by the evidence, but the amended decree, in any view of the amending order, absolves her from it.

It was next contended that she had received assets from her father, Waris Ali, and was therefore liable. It was scarcely insisted that any had descended from her father, but it was strongly urged that from the time of his death to the end of suit A., a period of five years, she was in joint possession, with her co-heirs, of the mouzah which was the subject of suit A, and must therefore have received profits, which she was bound to account for. It is sufficient to say that their Lordships can discover no clear and definite proof, either in suit A. or in the present suit, that this was so; and the courts below having assumed to the contrary, it is impossible their Lordships can now, for the first time, find the fact of such possession.

The case is thus reduced to a question of procedure, viz., whether it was competent to the Respondent to bring the present suit. The Appellant's contention is founded on sect. 11 of Act XXIII. of 1861, which, among other things, enacts that "any question arising between the
 " parties to the suit in which the decree was
 " passed, and relating to the execution of the
 " decree, shall be determined by order of the
 " court executing the decree, and not by a separate suit, and the order passed by the court
 " shall be open to appeal."

This enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation. They therefore feel bound to say they are unable to assent to some of the reasons on which the High Court have founded their judgment. They cannot concur in the general proposition, that a party sued in a representative character is not a party to the suit within the meaning of clause 11 of the Act of 1861, which is, as the Chief Justice observes, to be read as part of Act VIII. of 1859.

The 203rd section of Act VIII. makes express provision for the manner of execution in such cases: viz. (1) against the goods of the deceased person, and (2) in certain events against the Defendant "to the extent of the property not duly applied by him, in the same manner as if it had been against the Defendant."

It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that under certain conditions his own private property may be attached and sold. It is true, that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable, and proper to be ascertained in the suit in which the decree is made, during the progress of the execution proceedings founded upon such decree.

It does not seem to their Lordships to follow that because all the provisions relating to execution cannot be applied to a Defendant sued in a representative character, such a Defendant cannot be regarded as a party to the suit, within the meaning of such of them as may be applicable to his case.

It may be true that "cross decrees" cannot be set off between parties to suits in different characters under sec. 209; and that decrees cannot, in the first instance, be enforced by imprisonment against a party sued only in a representative character, under sec. 201. But it may be observed, that, in a case where there is a finding that the property of the deceased has not been properly applied, and when the decree under sec. 203 may be executed against the Defendant to the extent of the property wasted, as if it had been against him personally, there would seem to be no inconsistency in holding the clause relating to imprisonment to be applicable.

In a case then, in which a decree has been properly passed, and proceedings taken under it

to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree, within the meaning of the 11 clause of the Act of 1861.

But their Lordships consider that there are other grounds upon which the judgment in the present case may be supported. In their view it is not satisfactorily established that there is an existing decree which warranted any execution whatever against the Respondent. It has been already pointed out that the original decree was amended by the High Court on appeal, by a decree directing Jumae to be released from the suit altogether. This decree was obviously erroneous, for it is clear she ought not to have been released from the suit in her representative character as one of the heirs of Waris Ali, but only in her own personal capacity. The decree releasing her from the suit altogether was, as the Chief Justice observes, probably so drawn up by mistake. Still it was so drawn up, and it does not appear to have been ever formally set right. It is true that by the order of the High Court of the 8th July 1864, upon Jumae's own appeal against the order for sale of her private estate, the court, by declaring that her liability under the decree as one of the heirs of Waris Ali extended only to such property as she might have inherited or received as such heir, implied and affirmed that she was liable to this extent. But this order was made, not on an appeal against the decree, but against the order of sale made in the execution proceedings. In point of form, therefore, the decree releasing her altogether was left standing; and although the mistake may have been in substance corrected by the order of the 8th July, that order was not acted upon by the present Appellant; and, on the contrary, it was at

his instigation, swept away by the subsequent proceedings above referred to.

If that order had been acquiesced in and acted upon by the Appellant, it might perhaps have been regarded as a virtual amendment of the decree, but even in that case the sale of the Respondent's private estate, of which she now complains, could not properly have taken place under it. However, the Appellant refused to acquiesce in it, choosing to rely on his strict right; and upon his objection that in point of procedure it was wrong and could not affect the orders of sale of the 5th October 1863, and of confirmation of the 15th March 1864, it was set aside, or at least declared to be without force.

When, therefore, the Appellant insists that the present suit is not competent, because the questions relating to the execution ought to have been determined in the former suit A., his objection, which relates only to procedure, may, their Lordships think, be properly met by the counter-objection that in point of procedure his own decree in suit A. is ineffectual, as actually drawn up, to support any execution against Jumae, and that the proceedings which may have virtually set it right, and warranted some execution, have lost all efficacy for that purpose by his own acts. Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorising an execution against the Respondent's estate; and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree.

Their Lordships therefore being of opinion that the decrees under Appeal are substantially just, and that under the peculiar and exceptional circumstances of the case, Act XXIII of 1861 was not a bar to the suit, will humbly advise Her Majesty to affirm the decrees, and to dismiss this Appeal, with costs.

