

## Jagdamba Misir vs Ram Jit Singh And Ors. on 1 May, 1950

**Equivalent citations: AIR1953ALL253, AIR 1953 ALLAHABAD 253**

### JUDGMENT

Agarwala, J.

1. This is a decree-holder's appeal arising out of an objection under Section 47, Civil P. C.
2. The appellant obtained a decree for money from the Judge, Small Cause Court, Banaras, in 1937. The judgment-debtor respondent was an agriculturist. While passing the decree, the learned Judge, under the provisions of Section 3, Agriculturists' Relief Act, declared that one-half share belonging to the judgment-debtor, in the family properties which were specified, was charged with the payment of the decretal amount and granted instalments. The judgment-debtor died and his brother, who is the present respondent, succeeded to the property by right of survivorship, he being a member of a joint Hindu family with the deceased.
3. No instalments having been paid, the decree-holder, in the year 1941, after having got the decree transferred to the Court of the Munsif for the purposes of execution, applied for execution of the decree by attachment and sale of certain property including the property charged under the decree. Ranjit Singh respondent objected that the property was joint Hindu family property, that he had succeeded to it by right of survivorship, and that it could not be sold in execution of the decree, and that, in any case, a regular suit for enforcing the charge should be brought, as the property could not be sold under the provisions of Order 34, Rules 14 and 15 without obtaining a decree under Order 34, Rules 4 and 5, Civil P. C. Both the Courts below have allowed the objection and dismissed the execution application.
4. In my opinion, the view taken by the Courts below is wrong. When a charge is created by a Court under Section 3, Agriculturists' Relief Act, on the property of the judgment-debtor, it attaches to the rights and interest of the judgment-debtor in the property and is binding on the person who succeeds to the property on the death of the judgment-debtor whether by succession or by survivorship. When the interest of a coparcener in a joint Hindu family is attached before his death in execution of a decree passed against him, his interest can be sold even after his death, when the property is in the hands of a survivor because the latter takes the property subject to the rights of the creditor under the attachment, vide *Faqir Chand v. Sant Lal*, 48 ALL. 4.
5. The same is true in a greater degree in the case of a charge. The survivor, therefore, takes the interest of the deceased coparcener subject to the charge.

6. When a decree for recovery of money is passed by the Court and a charge on the property is created for the realisation of the amount decreed, the intention of the Court presumably is that the property charged may be sold in execution of that very decree. It is not intended that there should be a fresh suit for the recovery of the amount decreed, unless the contrary be expressed in the decree.

7. Order 34, Rule 14 does not apply to a case in which a charge has been created by the decree itself. It applies to a case in which a decree has been obtained for the payment of money "in satisfaction of a claim arising under the mortgage". The mortgage in such a case must be one executed prior to the obtaining of the decree. Where the charge is created by the decree itself, it cannot be said that the decree has been obtained for the payment of money in satisfaction of a claim arising under the charge. The properties charged under the present decree were, therefore, liable to be sold in execution thereof and no fresh suit was necessary.

8. It has been objected that as this was a small cause court suit, the small cause Court had no jurisdiction to create a charge. Section 3 (2), Agriculturists' Relief Act, empowers a Court "to create a charge". The 'Court' is defined as any civil Court. The Court of small causes is a civil Court and is, therefore, empowered to create a charge under the provisions of Section 3 (2).

9. Lastly, it has been urged on behalf of the respondents that the decree-holder in the present case did not enforce the charge to apply for the attachment not only of the charged property but non-charged property as well. It is contended that the decree-holder's action showed that he was not enforcing the charge at all. The property which is not charged under the decree cannot of course be taken in execution of the decree after the death of the judgment-debtor when the objector, the judgment-debtor's brother, has succeeded to that property by survivorship as there was neither a charge nor attachment in respect of that property. But the property which was charged under the decree can be sold in execution of the decree and the mere fact that an attachment has been prayed for and effected does not stand in the way of the decree-holder's right to have the charged property sold in execution of the decree.

10. I, therefore, allow this appeal in part, modify the decree passed by the Court below and order that the objection shall stand dismissed qua the property which had been charged under the decree, that is to say, to the extent of the interest of the deceased judgment-debtor in that property. It shall stand allowed qua the rest of the property.

11. The parties shall bear their own costs in all the Courts.

12. Leave to appeal under the Letters Patent is refused.