

(1923) 05 PAT CK 0019
In the Patna High Court

Firm of Shyam Lal-Gokul Chand

APPELLANT

Vs

Jamil Ahmad

RESPONDENT

Date of Decision : 25-05-1923

Acts Referred:

Citation : AIR 1924 Patna 110 : 74 Ind. Cas. 487

Hon'ble Judges : Dawson Miller, C.J.;Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—This is an appeal by the decree-holders against an order of the Subordinate Judge of Patna, dated the 18th March 1922, dismissing their application for execution of a mortgage-decree. It appears that Musammat Bibi Pasihan, a rich Muhammadan lady, died possessed of considerable landed properties. Before her death she had executed three deeds of gift in favour of two of her sons and one of her daughters. After her death, the remaining heirs, of Bibi Fasihan brought several suits of setting aside the gifts and for recovery of possession of their legal share in the estate. In those suits all the three deeds of gift were set aside and a preliminary decree for administration of the estate of Bibi Fasihan was made and a Receiver was appointed by the order of the District Judge of Patna to administer the estate of Bibi Fasihan. It appears that the defendant No. 2, Sheikh Muhammad Kalimuzaffar, who was one of the sons of Bibi Fasihan in whose favour one of the deeds of gift was executed, mortgaged some of the properties which he obtained under the gift, to the decree-holders under a mortgage dated the 1st March 1912. The decree-holder brought a suit on that mortgage and he impleaded the Receiver appointed by the District Judge of Patna as a party defendant in the mortgage suit. The decree passed in that mortgage suit runs in the following terms:

Suit be decreed ex parte with costs against defendant No. 2 (Kalimuzaffar) and on contest against others. Defendant No. 2 to pay decretal money in six months from to-day, in default, the mortgage property or as much of it as is found to be the property of defendant No. 2 after liquidation of debts by the Receiver as

directed by the Hon"ble High Court shall be sold for satisfaction of the decree.

2. It appears that the estate of Bibi Fasihan has not been fully administered yet and a portion of the debts due from the estate of Bibi Fasihan has still to be paid by the Receiver. The decree-holder filed this application for execution of the decree and an objection was made by the Receiver to the effect that under the terms of the decree so long as the debts of Bibi Fasihan have not been paid off, the property mortgaged by Kalimuzaffar could not be sold. The learned Subordinate Judge has given effect to this objection and has dismissed the execution case. Against this order of the learned Subordinate Judge the decree-holders prefer this appeal to this Court.

3. It is evident that, so long as the debts due from the estate of Bibi Fasihan have not been liquidated it cannot be ascertained what the share of Kalimuzaffar in the mortgaged properties is, and under the terms of the decree nothing can be sold so long as it is not ascertained as to what the share of Kalimuzaffar is in the estate.

4. The learned Vakil for the decree-holder states that almost the whole of the debts due from the estate of Bibi Fasihan has sbeen paid except the debts of two creditors namely, Girdhar Das and Dulhin Sona Kuar. But it appears that litigations are going on as regards these two debts and it is not certain as to whether the estate of Bibi Fasihan will or will not ultimately the made liable for these debts. I am, therefore opinion that the learned Subordinate Judge was right in his order that the execution of the mortgage decree cannot be taken out so long as the debts have not been paid off. It is, no doubt, very desirable that the administration should be completed as quickly as possible. It is manifestly unjust to the heirs of Bibi Fasihan that the administration should be prolonged, but as matters stand I do not see how the decree-holders can be allowed to execute their decree at present. If the decree-holders make an application to the District Court by whom the estate is being administered, the District Court, if it thinks proper, may make arrangements for payment of the debts due from the estate of Bibi Fasihan to the decree-holder either wholly or in part, or it may make some arrangements which, under the circumstances of the case, may seem to it proper to release a portion of the estate in favour of Kalimuzaffar, so that the decree-holders can execute their decree against that portion of the estate. However, as the matter row stands, we are not in a position to give any direction to the District Judge who is administering the estate. It would be for the decree-holders to make such application to the District Court as he thinks proper, and I am sure that on such application being made the District Judge will pass such orders as may be proper. This appeal is dismissed with costs.

Miller, C.J.

5. I agree.