

**(1942) 03 PAT CK 0005**  
**In the Patna High Court**

Mt. Kusmi and Others

APPELLANT

Vs

Sadasi Mahto and Others

RESPONDENT

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**Date of Decision :** 11-03-1942

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 47  
Criminal Procedure Code, 1898 (CrPC) — Section 488  
Evidence Act, 1872 — Section 91

**Citation :** AIR 1942 Patna 432

**Hon'ble Judges :** Shearer, J;Agarwala, J

**Bench :** Full Bench

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**Judgement**

Shearer, J.—This second appeal is by the heirs of one Sheikh Kurban who on 26th July 1929, advanced a sum of money to one Aklu Mahto on the security of a mortgage on 1 bigha, 17 kathas and 3 dhurs of land which he assumed, belonged to a joint family of which Aklu Mahto was the karta. A suit was brought on the basis of this mortgage bond and in it were impleaded, besides Aklu Mahto, his three sons. The two younger sons, Bhadai Mahto and Sadasiva Matho, set up the plea that some time prior to the execution of the mortgage, they had separated from their father and elder brother. According to them, in or about 1922, there had been a quarrel between their parents and eventually their mother had made an application for maintenance to the criminal Court u/s 488, Criminal P.C. In this they had taken the side of their mother while their elder brother, Lachhmi Mahto, had supported their father. The proceeding in the criminal Court ended in a compromise brought about by certain punches or arbitrators. The sum and substance of the compromise was that 15 kathas out of the land which was later mortgaged was to be assigned to Bhadai Mahto and Sadasiva Mahto and their mother for their maintenance. This arrangement was to be subject to revision, if and when both the parents died, when the whole of the joint family property was to be divided among the three brothers. The Court which tried the mortgage suit dismissed it as against Bhadai Mahto and Sadasiva Mahto on the ground that they were not necessary parties. It expressly left open

the question whether or not there had been a partition between them and their father and brother and whether or not; at the time when the mortgage deed was executed, they had an independent interest in the mortgage property. The mortgage suit was decreed as against Aklu Mahto and Lachmi Mahto and eventually in execution of the decree the mortgaged property was sold and was purchased by the mortgagee, Sheikh Kurban. When, subsequently, he took out a writ for delivery of possession, Bhadai Mahto and Sadasiva Mahto made an application under Order 21, Rule 100, Civil P.C. This application was dismissed and thereupon they instituted the suit out of which this second appeal arises.

2. The punches or arbitrators who effected the compromise in the proceedings in the criminal Court in 1922, made an award in writing. The trial Court declined to admit this in Evidence and in view of the decision in *Badri Chaudhuri Vs. Mt. Ghamoa Ghaudhrain*, this would appear to have been correct.

3. Mr. Yasin Yunus for the appellants contends that as the award was not admissible in evidence, oral evidence to show that there had been a separation in the joint family ought to have been excluded. The provisions contained in Section 91, Evidence Act are not, however, applicable in this way. It is true that, in so far as the award created a charge in favour of the mother of the plaintiffs on a portion of the mortgaged property, oral evidence to show that such a charge ever existed was inadmissible; but oral evidence to show that at or about the time the charge was created there had been a disruption in the joint family of which Aklu Mahto was the head, was quite clearly relevant. The matter would, no doubt, have been otherwise if it had been shown that the award operated not merely to create a charge but as a deed of partition. In that case the decision in *Kachubhai V. Krishnabai* ('77-78) 2 Bom. 635 on which Mr. Yasin Yunus relied, would have been in point; but it was not the case of either party that there had been formal partition by metes and bounds of the property of the joint family in or about 1922. The case of the defendant was that the family was still joint. The case of the plaintiffs was that although, in 1922, Aklu Mahto and one of his sons had separated from his other two sons it had been agreed between them that the property should not be finally partitioned until both Aklu Mahto and his wife were dead. It is true that the plaintiffs asked that on partition this 15 katbas should be allotted to them; but this was an alternative to their other prayer that land corresponding to their eight annas interest in the whole of the joint family property should be given to them and would seem to have been made as they would have been content to take this 15 kathas, even if they were found to be actually entitled to a somewhat larger area.

4. Mr. Yasin Yunus for the appellants then contended that there was no clear arid definite finding in the judgment of the lower appellate Court that there had been a disruption of the joint family in the year 1922. After reading and re-reading the judgment and also examining the evidence adduced in the trial Court I am, however, unable to take this view of the matter. There was evidence on which the Courts below could come to the conclusion and, in my opinion, they have come

to the conclusion, that there was a disruption of the joint family in 1922, and it was then agreed that a formal partition by metes and bounds should be deferred until the happening of a certain future contingency.

5. The last point taken by Mr. Yasin Yunus is one which was not raised in the Courts below and is that the suit was not maintainable. It is contended that, as the mortgage suit was dismissed as against these plaintiffs they were parties to the suit within the meaning of the explanation to Section 47, Civil P.C., and that, as the question which arose between them and Sheikh Eurban was a question relating to the execution of the decree, it ought to have been decided by the Court which executed the decree. Reliance is mainly placed on the decision in *Sheikh Kaloo v. Bholanath* AIR 1925 Pat. 482. In that case, it appears that one Sheikh Kaloo was sued along with two other persons for a certain sum of money. The suit as against Sheikh Kaloo was dismissed and as against the other defendants was decreed. The decree was put into execution and certain property was attached. Sheikh Kaloo applied for the withdrawal of this attachment on the ground that the property belonged to him and not to the judgment-debtors. The application was allowed by the Munsif; but on appeal the decision was set aside by the District Judge. In second appeal it was contended that no appeal lay. The decisions relied on were decisions prior to the amendment of Section 47, Civil P.C. and the High Court took the view that as Sheikh Kaloo had been a party to the suit the appeal to the District Judge was competent. That decision does not, in my judgment, apply to the facts of the present case for more than one reason. In the first place, it appears that the suit as against Sheikh Kaloo was dismissed on contest and not on any preliminary ground. Secondly, the decree was a decree for money and the question that arose as between Sheikh Kaloo on the one hand and the decree-holder on the other, could fairly be said to be a question relating to the execution of the decree. The mortgage suit as against the present plaintiffs was, however, dismissed on the preliminary ground that they were not necessary or proper parties inasmuch as they claimed the mortgaged property or an interest in it by title paramount. It is clear that instead of dismissing the suit as against them the Court ought to have ordered their names to be struck out of the plaint. A Division Bench of the Madras High Court in *Abdul Sac v. Sundara Mudaliar* AIR 1930 Mad. 817 in which the facts were directly analogous to the facts with which we are now concerned, expressed the view that where a Court, instead of directing that a certain party should be struck out as having been improperly impleaded, erroneously makes an order dismissing the suit as against them, these persons cannot properly be said to have been parties to the suit within the meaning of the explanation to Section 47, Civil P.C. I respectfully concur in the view expressed there.

6. Apart from that, the question that arose between the plaintiffs on the one hand and Sheikh Eurban and his heirs on the other, cannot, in my view, properly be said to have been one relating to the execution of the decree. The point at issue between them was whether or not in 1929, when the mortgage deed was executed the plaintiffs had an interest in the mortgaged property independent of

the mortgagor, Aklū Mahto. It may be that if " that question is decided in one way it will be to the benefit of the mortgagee and if it is decided in another way, it will be to his detriment; but that cannot make it a question relating to the execution of the decree. The Allahabad High Court in *Mt. Shibbi v. Hardhian Singh* AIR 1927 All. 378 took that view of the matter. That also was a case in which a person, One Mt. Shibbi, claimed an interest in certain property which had been mortgaged by title paramount. Mukerji, J. there made the following observations:

I am clearly of opinion that the suit is not barred by the provisions of Section 47, Civil P.C. I am prepared to concede, without deciding the point, that the exemption of the present plaintiff from the suit of 1917 was tantamount to the dismissal of the suit as against her. But it is clear to me that the question now raised is not a question contemplated by Section 47, Civil P.C. Section 47 does not apply to all sorts of questions that may arise between people who had once been parties to a decree. It applies only to questions that arise relating to the execution, discharge or satisfaction of the decree to which the litigants are parties....

Mt. Shibbi is not attempting to recover the costs by the present suit. She wants a decision on the question of title that was left open in the suit of 1917. That question must be decided. But it cannot be decided in the execution of the decree.

7. As in that case, so in the present case, the question on which these plaintiffs sought a decision was whether or not prior to the execution of the mortgage deed they had any interest in the mortgaged property which was not and could not be bound by the mortgage. Mr. Yasin Yunus for the appellants referred to two other decisions of the Allahabad High Court. One of these, namely, *Parbhu Dayal v. Anandi Din* AIR 1919 All. 192 was prior to the decision just cited and the other, namely, *Saeed Ahmad v. Raza Hussain* AIR 1933 All. 57, was subsequent to it. In the latter decision the earlier decision was not referred to or considered. If it had been it is possible that it would have been distinguished. The question that arose in *Parbhu Dayal v. Anandi Din* AIR 1919 All. 192 was of somewhat different kind to that with which we are now concerned and more analogous to the question raised in *Sheikh Kaloo v. Bholanath* AIR 1925 Pat. 482 which as I have already said, is not here directly in point. For these reasons I would dismiss the appeal with costs.

Agarwala, J.

I agree.