

*Civil Petition.*1888.
April 8.

MATHURA'DA'S GOVARDHANDA'S *Petitioner.*
 FA'TMA' ULKA BEGAM *Opponent.*

*Procedure—Sale under Decree—Joint Owners—Extraordinary
 Jurisdiction.*

Where an execution debtor is jointly interested with another person in immoveable property which the execution creditor seeks to sell in execution of his decree, the ordinary procedure for a court executing the decree to adopt is, to put up for sale the right, title, and interest of the judgment debtor in his undivided share of the property to be sold.

Where the court below adopted a different procedure, and, after partitioning the property, put up for sale the *divided share* of the execution debtor, the High Court, in the exercise of its extraordinary jurisdiction, refused to interfere, in consequence of the laches of the applicant in neglecting to avail himself of an opportunity, which the lower appellate court had given him, of showing that the partition which had been made was injurious to him.

THIS was an application made to the High Court, in the exercise of its extraordinary jurisdiction, under Cl. 2, Sec. v. of Reg. II. of 1827, to set aside an order of C. G. Kembal, District Judge of Súrat.

The petitioner, Mathurádás, obtained a decree for debt against the Bakhshi Mir Mohiuddin Khán of Súrat (deceased), who was the brother of the opponent, Fátma' Begam. In execution of this decree, the petitioner sought to attach and sell the whole of a building called Dariámahál, in which the Bakhshi was admittedly entitled to a share consisting of two-thirds, and his sister, Fátma' Begam, to a one-third share. The Principal Şadr Amín and the District Judge held that it would not be equitable to sell the whole house under the decree, as the one-third and two-thirds could be separated, without inconvenience or loss to the petitioner.

On inquiry the Principal Şadr Amín held that the *mardáni* (male) apartment was properly the two-thirds of the whole of the Dariámahál, and that, therefore, it alone should be sold in execution of the decree, and that the *janáni* (female) apartment should be left for Fátma' Begam as her one-third share. The District Judge, to whom the petitioner made

1868.
 MATHURA'DA'S
 GOVARDHAN-
 DA'S
 v.
 FATMA'
 BEGAM.

an application, refused to interfere with the order of the Principal Sadr Amín.

The case was heard before NEWTON, Acting C.J., and TUCKER, J.

Nánabhái Haridás, for the petitioner :—As the decree sought to be executed was a decree for money, and not for a partition of the property, the lower court had no jurisdiction to order partition. The proper course for the court to take was, to sell such interest as the Bakhshi had in the property, leaving the purchaser to make a partition. Had this been done, Fátmá Begam would have purchased the two-thirds share, or given up her one-third share at a valuation. The property, if sold as a whole, will be disposed of to better advantage than if the separated two-thirds only be sold. Besides, the portion that has been reserved for Fátmá Begam is more than her share. It is on the river-side, and has tanks, &c. included in it. At any rate, there is no evidence before the court to show that the partition is a fair one ; and as in any case my client will be materially injured, if the decree is carried out in the way proposed, I contend we are entitled, as in the ordinary case of joint ownership, to have the Bakhshi's undivided portion sold, or else to have the whole property sold and one-third of the purchase-money paid to Fátmá Begam.

White (with him *Dhivajlál Máthurádás*), *contra*:—The conduct of the creditor towards Fátmá is oppressive. *First*, he laid an attachment on the whole Dariámahál. Fátmá applied, under Sec. 246, to set aside the attachment ; but failing in that, she filed a regular suit, and it was declared therein that her one-third share could not be sold. The court below then made the order, to set aside which this petition is brought. That order is, I submit, a just order, and fair towards the parties. It would be most unjust to allow the creditor to sell the whole property. [NEWTON, Acting C.J. :—If the right, title, and interest of the Bakhshi is sold, as the petitioner demands, still the court, under Sec. 268 of the Code, will be required to do what has been done,—make partition.] Yes. And, unless the petitioner can show that

he has been materially injured, the court will not interfere in the exercise of its extraordinary powers. In no case will the petitioner be allowed to turn Fátmá out of her apartments; the rule of Equity is, that on partition care shall be taken to assign to the parties such portions of the estate as will best accommodate them. Story on Equity, Secs. 655 and 656. If Fátmá's share is more than one-third, she might have to pay compensation. [TUCKER, J.:—The Muhammadan law appears to direct that each share shall be appraised and then assigned by lot.] In Equity any single part-owner can enforce partition, but by Muhammadan law all must consent, which we do not do. There is nothing to show that the partition the courts below have made is unfair. The result of the evidence is to show that Fátmá has got rather less than her one-third share. At any rate, this is a question of fact, with which the court would not interfere even in special appeal, if a special appeal lay, much less on the present application.

Nánábhái Haridás was heard in reply.

PER CURIAM:—It appears that the petitioner, Mathurádás, obtained a decree against the estate of the deceased Bakhshi generally, and that, as the extent of the Bakshi's right in the Dariámahál was not defined in that decree, the petitioner considered that he was entitled to attach the whole of it; and he accordingly made an application for the attachment and sale of the whole house as belonging to the Bakhshi. Subsequently the High Court, in special appeal (No. 211 of 1864), declared that the right of the Bakhshi in the Dariámahál extended to two-thirds of it only, and that the remaining one-third belonged to his sister, Fátmá Begam.

The proper procedure thereupon would have been to apply for the execution of the High Court's decree. The petitioner had no right to seek to have his first application carried out. He never applied, however, for the execution of the High Court's decree.

Had there been an appeal to us in this case, we should have considered whether the Principal Şadr Amín had a right to make a partition.

1868.
MATHURÁDÁS
GOVARDHAN-
DÁS
v.
FÁTMÁ
BEGAM.

1868.
 MATHURA'DA'S
 GOVARDHAN-
 DA'S
 v.
 FA'TMA'
 BEGAM.

The ordinary procedure, under the circumstances of the case, would have been, to put up for sale the Bakhshi's right, title, and interest in the property, which extended to two-thirds, leaving it to the purchaser to settle with Fátma' Begam what portion of the property formed the two-thirds share, no partition or separation of her share having been made. We must make a distinction between cases in which an appeal is allowed, and those in which we are solicited to exercise our extraordinary jurisdiction. In the latter class of cases it is not our practice to interfere, unless a substantial injury is shown to have been done to the party coming before us; and the applicant in this case has no such injury to complain of.

From the report of the engineer, it appears that the area of that portion of the property which has been reserved for Fátma' Begam is more than one-third of the whole Dariá-mahál; but it may be that the area is not in proportion to the value, although it has not been shown that there are tanks in the share assigned to Fátma' Begam, so as to render it more valuable.

We find that there were several inquiries to ascertain the value of the shares, that the Názar and the Principal Šadr Amín inspected the premises in the presence of the petitioner, and that the latter was allowed an opportunity to show that the division proposed was not a fair one. We also find that the Judge was inclined, when the case was first before him, to uphold the order of the Principal Šadr Amín, but that, at the instance of the petitioner, he remanded the case, in order that the petitioner might show that the partition was unfair to him, and that he then did not take any steps to establish his objection.

As he failed to avail himself of the opportunity which was given to him, he cannot now, with any justice, complain that the assignment of shares, which has been made by the court of first instance, is injurious to him; and, after such laches on his part, it would not be right for us to interpose on his behalf, by having recourse to our extraordinary jurisdiction. We reject his application with costs.

Petition rejected.