

*Civil Petition.*1888.  
April 22.

A'TMA'RA'M KALIA'NDA'S v. FA'TMA' BEGAM.

*Execution of Decree—Partition.*

In execution of a decree which merely declared that the right of a judgment debtor in certain property extended to two-thirds of it, the lower court divided the property before selling the debtor's share :—*Held*, that— as the decree did not specify that any particular portion of the property belonged to the debtor as his share—his right, title, and interest in the property could only be sold, and that the determination of this right must be left for future adjudication between the purchaser and the co-sharer of the debtor, unless an arrangement could be arrived at.

THIS was an application to the High Court for the exercise of the extraordinary jurisdiction given to it by Cl. 2, Sec. v. of Reg. II. of 1827, under the following circumstances :—

The applicant, A'tmáram, having filed a suit against Fátma Begam, to recover the balance of principal and interest due on a mortgage bond executed by her deceased brother Mir Mohiuddin Khán, the Bakhshi of Súrat, obtained, on the 22nd of December 1864, a decree, in Special Appeal No. 356 of 1864, whereby the High Court decreed to the applicant the sum of five thousand rupees against the estate of the late Bakhshi, and against his sister, Fátma Begam, as his legal representative, to the extent of any assets of the said Bakhshi's estate which were found by the High Court, in Special Appeal No. 211 of 1864, to be in, or should thereafter (under Sec. 203 of the Code of Civil Procedure) be found to have passed into, her possession. The said decree declared that the said Bakhshi's interest in Dariámahál and its appurtenant buildings, which extended to a share of two-thirds of the entire ancestral property, which formed the joint inheritance of himself and his sister the defendant, Fátma Begam, should alone be liable to the claims of his creditors.

On the 27th of August 1866, the applicant, A'tmáram, applied for the execution of the said decree by the attachment and sale of the mortgaged property, which did not

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include Dariámahál, &c. This last-mentioned application was opposed by Fátma Begam, on the ground that she had a third-share in the said property, and that, therefore, the whole of it could not be attached and sold. The Principal Şadr Amín of Súrat, who had tried the original suit, thereupon directed, on the 4th of October 1866, that, as the deceased Bakhshi had a right over two-thirds of the property, a warrant would be issued for the attachment and sale of the said share only, on the same being pointed out by the applicant. The applicant thereupon presented a petition to the Judge of the District, C. G. Kemball, but he rejected it, on the 18th of October 1867, on the ground that it would be highly improper to dispose of by auction unnecessarily the share of Fátma Begam.

The case came on for hearing this day, before NEWTON, Acting C.J., and TUCKER, J.

*Nánabhái Haridás*, for the applicant:—In this case the property sought to be attached and sold is mortgaged to us, and it is in our possession; and the decree of this court does not declare that the Bakhshi's sister, Fátma Begam, had any right to this property, as the decree in the other case (Special Appeal No. 211 of 1864) did declare that the Bakhshi's share in Dariámahál &c. was two-thirds. We want to sell merely the right, title, and interest of the Bakhshi in the property, leaving the purchaser and Fátma Begam to settle what right the deceased Bakhshi had in the property, as we do not admit that the property now in dispute is ancestral, like Dariámahál. [TUCKER, J.:—The decree should have been against the mortgaged property; but it is not so—why, I don't know: perhaps by some mistake in drawing up the decree.] The Principal Şadr Amín says that, unless we show that a particular portion is the two-thirds, he will not attach the property; but the two-thirds has never been divided, nor is it decided that Fátma Begam has a one-third share in this property.

*Dhirajlál Mathurádás*, *contra*:—The Principal Şadr Amín finds the property to be ancestral. The petitioner did not

appeal on this point, nor did he ever dispute, until now, that the property is not ancestral.

*Nánabhái*, in reply :—As mortgagee, we are in possession of the whole of the property, and no one can dispossess us until we get our money.

PER CURIAM :—We are of opinion that the applicant is entitled, under his decree, to have the interest of the late Bakhshi of Súrat in the property in dispute attached and sold. The decree has not been made against the mortgaged property, nor does it specify that any particular portion of the said property belonged to the Bakhshi, further than it contains a general declaration that the Bakhshi's interest in the entire ancestral property, which formed the joint inheritance of the Bakhshi and of his sister the defendant, Fátmá Begam, amounted to two-thirds. There is nothing in the decree to show that the attached property was ancestral, and, therefore, unless the parties, within a reasonable time not exceeding one month from this date, can come to some agreement as to what constitutes the late Bakhshi's share in the said property, his right, title, and interest in the undivided property can alone be sold; and the determination of what this right, title, and interest may extend to, must be left for future adjudication between the purchaser and Fátmá Begam. We modify the order of the District Judge and the Principal Śadr Amín, and direct that the attachment and sale be carried out in conformity with the views which are above expressed.

Each party to bear his own costs.

It must be observed that the other case of Mathurádás Govardhandás (*a*) is distinct from this, as Mathurádás did not avail himself of the opportunity given to him to show that the portion of the Dariámahál found by the Principal Śadr Amín to be the two-thirds share of the Bakhshi was not so.

(*a*) *Suprá*, p. 63.

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