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there was no evidence to show how the house had devolved on his mother Latiba, and in any case that Beram could not acquire any part of it by inheritance from his mother, whether by the custom of *kalwantins* or ordinary Mahomedan law. All the defendants claim through the son and daughter of Latiba, and it does not seem to have been disputed by the appellants in the Subordinate Judge's Court that she had become the owner of it, their allegation being that it was their ancestral property,—inheritance being in their caste confined to females. The District Judge ought, therefore, we think, to have started with the assumption that the house had devolved on Latiba. If that were so, Beram and Mushaf, although illegitimate, would, in the absence of usage, have inherited from their mother in the proportion of two shares to one, the presumption being that they are *sunis*, and no evidence having been given to the contrary: see Baillie's Digest of Mahomedan Law, p. 411, and Macnaghten's Principles of Inheritance, p. 91. In that case Beram would have been entitled to mortgage the house to the extent of his two-thirds share. As, however, the District Judge has not recorded a finding on the third issue, we must send the case back for a finding, to be transmitted to this Court within three months.

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## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.*

CHHAGANLAL (*Plaintiff*) *v.* FAZARALI AND OTHERS (*Defendants*).*
[2nd August, 1888.]

*Civil Procedure Code (Act XIV of 1882), s. 295—Decree—Execution—Rateable distribution of proceeds of decree—Power of Court to inquire into bona fides of the decree-holders while distributing such proceeds—Practice.*

In distributing the proceeds of execution under s. 295 of the Civil Procedure Code (Act XIV of 1882), the Court has power to inquire into the *bona fides* of the several decree-holders that apply for rateable distribution, if the same has [155] been called in question, and to decide it in the same manner as all other questions that arise in execution. The party aggrieved by such a decision is entitled, under the last clause of the section, to bring a regular suit to compel the successful judgment-creditor in execution to refund.

*In re Sunder Dass* (1) followed.

[F., 16 C L J. 582 = 17 C W.N 326 = 16 Ind. Cas. 795 ; **Doubted**, 1 C.W N. 633 (636).]

REFERENCE by Khan Bahadur B. E. Modi, Firs Class Subordinate Judge of Ahmedabad, under s 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff Chhaganlal presented an application to the First Class Subordinate Judge of Ahmedabad to execute his simple money decree in suit No. 1185 of 1887 by the attachment and sale of certain immoveable property belonging to his judgment-debtors, Fazarali (deceased) and others.

The property was attached and sold on the 8th December 1887, and the proceeds were realized by the Court.

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* Civil Reference, No. 11 of 1888.

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Before the proceeds were so realized, one Nathabai Jivabai made an application to the Court on the 26th November, 1887, for execution of his money-decree against the same defendants seeking only a rateable distribution, under s. 295 of the Civil Procedure Code, in the assets which might be realized in execution of Chhaganlal's *darkhast*.

Chhaganlal presented an application on the 9th February 1888, impeaching Nathabai's decree as fraudulent, and asking the Court to take evidence and decide that Nathabai was not entitled to claim any rateable distribution under his decree.

The questions referred by the Subordinate Judge for the High Court's decision were:—

(1) Whether the Court can make the inquiry asked for in these execution proceedings; and (2), if it can do so, what form the inquiry should take,—in other words, whether it should be a summary, superficial and *prima facie* inquiry only, or whether it should be as full an inquiry as would be required to be made if the question arose in a regular suit?

The Subordinate Judge was of opinion that such an inquiry cannot be made in execution proceedings, and that in case such [156] an inquiry is to be made, it should be a summary one and should be confined within any limits which the Court may in its discretion think fit to fix in each case.

*Harilal K. Panday*, in support of the reference.—The question raised by the reference is not one that can be tried in execution. Section 295 of the Civil Procedure Code (Act XIV of 1882) by its last clause gives a remedy by a separate suit. The person who impeaches the plaintiff's decree as fraudulent is a mere stranger, and should not be allowed to do so—*Purshottam Vithal* v. *Purshottam Iswar* (1). The Subordinate Judge was, therefore, right in his opinion that he had no power to inquire into the *bona fides* of the decree-holder who sought first to execute his decree.

JUDGMENT.

SARGENT, C. J.—The question referred to us is not without difficulty, but we are disposed to adopt the ruling of the Calcutta High Court in *In re Sunder Dass* (2), that the Court distributing the proceeds of execution under s. 295 of the Civil Procedure Code (Act XIV of 1882) should inquire into the *bona fides* of the decree-holders if called in question and decide it in the same manner as all other questions that arise in execution. The party aggrieved will be entitled, under the last clause of s. 295, to bring a regular suit to compel the successful judgment-creditor in execution to refund.

(1) 8 B. 532. (2) 11 C. 42.