

APPELLATE CIVIL.

Before Mukerji and Mitter J.J.

DWIPALCHANDRA BARDHAN.

v.

JEEBAN DEBI.*

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Aug. 1, 4.

Execution—Decree-holder—Possession—Judgment-debtor—Resistance by stranger—Good faith—Order refusing restoration—Appeal—Code of Civil Procedure (Act V of 1908), ss. 47, 97-101, 103; O. XXI, rr. 98, 99, 103.

Where a court finds that resistance or obstruction was caused by the judgment-debtor and makes an order directing the applicant to be put in possession or refuses to make an order on the ground that the judgment-debtor had just cause, that order would be one coming under section 47 of the Code.

But where an order is made under Order XXI, rule 98, in respect of a stranger, on the footing that he caused the obstruction at the instigation of the judgment-debtor, or where the court, being satisfied that the resistance, or obstruction, was occasioned by a person other than the judgment-debtor and claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, dismisses under Order XXI, rule 99, the decree-holder's application to be put in possession, the judgment-debtor has no concern with the order, and it cannot be regarded as an order relating to the execution, discharge or satisfaction of the decree and no appeal lies therefrom.

The decree-holder cannot treat such an order as one under section 47 and prefer an appeal but, as appears from Order XXI, rule 103 of the Code, his remedy lies in a suit to establish the right, which he claims, to the present possession of the property.

Kailash Chandra Tarapdar v. Gopal Chandra Poddar (1) distinguished.

APPEAL FROM ORIGINAL ORDER by the decree-holder.

The facts of the case, out of which this appeal arose, appear fully in the judgment under report herein.

Tarakeshwar Pal Chaudhuri for *Jnanchandra Ray* and *Prakashchandra Pakrashi* for the appellant.
Hiralal Chakravarti for the respondent.

Cur. adv. vult.

*Appeal from Original Order, No. 87 of 1929, against the order of D. Mukherji, Subordinate Judge of Alipore, 24-Parganas, dated Oct. 6, 1928.

MUKERJI AND MITTER JJ. This appeal has arisen out of an order passed by the Subordinate Judge of 24-Parganas on the 6th October, 1928. The facts necessary to be stated are the following: The decree-holder obtained a mortgage decree and, in execution thereof, purchased the mortgaged property, which was a dwelling house, and thereafter obtained an order for delivery of possession. In the course of the proceedings that followed, resistance was offered to his obtaining possession of two rooms in the house, with the result that he complained of such obstruction as having been caused to him not only by the judgment-debtor, but also by the judgment-debtor's wife in her personal capacity, as well as in her capacity as guardian of her minor son. This application having been made before the court on behalf of the decree-holder complaining of the aforesaid obstruction, opposition was entered on behalf of the judgment-debtor's wife. She alleged that the minor was born before the date of the suit and had not been made a party thereto and consequently was not bound by the decree and the sale. The court, accepting the contention urged on behalf of the judgment-debtor's wife, held that she was claiming in good faith to be in possession of the rooms, in respect of which resistance was offered, and that the application for delivery of possession, in so far as the said rooms are concerned, was to be dismissed. From this order the present appeal has been preferred by the decree-holder.

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A preliminary objection has been taken as to the competency of this appeal, it being urged that the order, from which it has been preferred, does not come within the purview of section 47 of the Code and consequently the decree-holder has no right of appeal from that order. This objection in our opinion must be upheld.

On behalf of the appellant it has been urged that, although the order was passed in a proceeding under Order XXI, rule 97, it was one which came within

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the purview of an order passed under section 47 of the Code. Reliance in this behalf was placed upon the decision of the Full Bench of this Court in the case of *Kailash Chandra Tarupdar v. Gopal Chandra Poddar* (1). In the judgment of Chatterjea, Acting Chief Justice, it was observed that "section 47 and "Order XXI, rules 97 to 101, make the same provision "for the purchaser of immovable property as for the "holder of a decree for possession of immovable "property in connection with resistance to execution, "which indicates that the legislature regards the "delivery of possession to the purchaser as a "proceeding in execution of the decree." These observations have been relied upon as justifying the position that an order made in a proceeding relating to obstruction to delivery of possession must be regarded as an order passed under section 47 of the Code. We are of opinion that this contention is not well-founded. It is true that matters decided in such proceedings are matters decided in execution proceedings; but all orders made in execution proceedings are not orders under section 47. The whole question is as to whether the orders, that are passed, are orders, which decided any question as to the satisfaction, execution or discharge of a decree as between the decree-holder and the judgment-debtor. Though the order complained of was passed in a proceeding relating to execution, it does not fulfil the requirements enunciated above. It is also plain from the reading of sections 97 and 103 of the Code that upon the findings, at which the court below has arrived, namely that the resistance or obstruction was offered not by the judgment-debtor nor on his behalf but by a person claiming under an independent right, that the order is not one which can be treated as having been made under the provisions of section 47 of the Code. Order XXI, rule 97, says that where the decree-holder or purchaser of any property sold in execution of a decree is resisted or obstructed by

any person in obtaining possession of the property he may make an application to the court complaining of such resistance or obstruction. Order XXI, rule 98, says that where the court is satisfied that the resistance or obstruction was occasioned by the judgment-debtor or by some other person at his instigation it shall direct that the applicant be put into possession of the property. Now, if the court had found that the resistance or obstruction was caused by the judgment-debtor and had made an order directing the applicant to be put into possession or refused to make such an order on the ground that the judgment-debtor had just cause, that order would have been one coming under section 47 of the Code and the judgment-debtor or the decree-holder, as the case may be, would have his remedy by way of appeal as from an order under that section. Where an order under Order XXI, rule 98, is made in respect of a stranger on the footing that he caused the obstruction at the instigation of the judgment-debtor, or, where, as here, the order is made under the provisions of Order XXI, rule 99, the court being satisfied that the resistance, or obstruction, was occasioned by a person other than the judgment-debtor and claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor and the court dismisses the application, the judgment-debtor has no concern with the order, and the order cannot be regarded as relating to the execution, discharge or satisfaction of the decree. The decree-holder cannot treat the order as one under section 47 and prefer an appeal, but, as appears from Order XXI, rule 103 of the Code, his remedy lies in a suit to establish the right, which he claims, to the present possession of the property. That rule is plain in its meaning. We are of opinion that the appellant has mistaken his remedy. We accordingly hold that no appeal lies in this Court and the appeal now before us must be dismissed. We make no order as to costs.

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On the application for revision we are not inclined to interfere, as the appellant has another remedy, which we have pointed out. The application is also dismissed.

The application for substitution, which is pending in connection with the above case, is dismissed.

Appeal dismissed.

G. S.