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AMBICA PERSHAD SINGH v. SURDHARI LAL.

The point that Mr. Handley, who appeared for the appellant in this case, did his best to impress upon us was this: that the application to issue a proclamation being unnecessary by law, was no application at all. He contended that under s. 287 of the Code, the Court itself was bound to have issued the proclamation, without any action being taken on the part of the decree-holder.

But in this, I think, he is in error; notwithstanding that the attachment had issued, the proceedings from time to time for the purpose of enforcing the sale must always be, and, as a matter of practice, always are, initiated by the decree-holder.

The Court cannot ascertain of its own motion what the wishes of the decree-holder are, or what portion of the property he desires to sell, unless an application is made for that purpose.

As the rest of the Court are also of opinion that the application is not barred, and as this appears to be the only question in the case, we think that the appeal should be dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

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June 7.

RAM CHARAN BUHARDAR AND OTHERS (PLAINTIFFS) *v.* REAZUDDIN AND OTHERS (DEFENDANTS).*

Res-judicata—Issue advisedly left undecided in former suit.

In 1878 *A*, as the auction-purchaser of a taluq, sued 35 persons for possession of a part of this taluq. In this suit the issues raised were—(1) whether *A* had purchased the whole taluq, or an eight-anna share of the right, title and interest of the judgment-debtors therein; (2) as to the correctness of the boundaries of the taluq as given in the plaint. The Court held that *A* had purchased the right, title and interest of the judgment-debtors in the taluq, and as it appeared that some of the defendants were not judgment-debtors, and as it did not appear what portions of the taluq were held by the several defendants, the lower Appellate Court dismissed the suit, with liberty to the plaintiff to bring a fresh suit within the proper time.

* Appeal from Appellate Decree No. 2517 of 1882, against the decree of F. Rees, Esq., Judge of Noakhali, dated 10th of August 1882, reversing the decree of Baboo Koruna Moy Banerji, Sudder Munsiff of Soodharam, dated the 27th of June 1881.

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In 1880 *A* brought a fresh suit against 16 of the same defendants and 19 others, for possession of a portion of the same taluq. The issues raised were—(1) whether the suit was barred under s. 13 of the Code; (2) whether *A* had purchased the whole or a portion of the taluq; (3) whether the defendants were in possession of all the disputed land, and, if not, what portions of the taluq were held by the several defendants; (4) as to the correctness of the boundaries of the taluq.

The Munsiff held that the suit was not barred, and on the merits gave *A* a decree. The Subordinate Judge held that the suit was barred, and refused to go into the merits.

Held, that the question, whether *A* had purchased the whole or only a portion of the taluq, was *res-judicata*, but that the question, as *to what lands* *A* was entitled to by virtue of his purchase having been left undecided in the former suit, *A* was entitled to a decision on that point.

IN 1878 one Ram Charan Buhardar, as the auction-purchaser of a certain taluq, sued 35 persons for possession of a part of this taluq, from which he had been dispossessed.

The issues framed in this suit, were—

(1). Whether the plaintiff purchased the whole taluq in suit and obtained possession of three kanis of land only, the remainder being held and possessed by the defendants without right; or whether the plaintiff purchased an eight-anna share of the taluq, and the right, title and interest of the judgment-debtors therein?

(2). Has the plaintiff given correct boundaries of the taluq in suit, or has he wrongly included lands of various other taluqs in his plaint?

Evidence was taken, and the Munsiff found that the plaintiff had not purchased the tenure itself, but only the right, title, and interest of his judgment-debtors therein; and that as the plaintiff had failed to prove the specific lands held by the judgment-debtors, he dismissed the suit "without prejudice to the plaintiff's right to bring a fresh suit for possession of the lands of the taluq in suit distinctly ascertained." The plaintiff appealed against the decision, but the judgment of the lower Court was upheld by the Subordinate Judge.

On the 18th August 1880, Ram Charan Buhardar brought a fresh suit in the same character against 30 defendants, for possession of 14 plots, which he alleged belonged to the taluq he had purchased.

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Sixteen of these defendants contended that the suit was barred by the former suit of 1878, which had been brought against them and 19 others. The issues framed in this suit, were—

(1). Whether the suit is barred as *res-judicata ?*

(2). Whether the plaintiff has purchased the entire tenure or a portion of the taluq, and if the latter, what is the share purchased by him ?

(3). Whether the defendants were in possession of all the disputed lands, and, if not, what portion of what plot is in whose possession ?

(4). Whether the boundaries of the disputed land are correct?

(5). Whether the defendants obstructed the plaintiff in taking possession of the land ?

The Munsiff found that the first suit was dismissed for "misjoinder and non-joinder," and that the subject-matter in issue had not been finally heard and determined so as to bar the second suit, and that therefore the plea of "*res-judicata*" failed; and on the merits he found that the plaintiff had purchased the entire taluq, and he, therefore, gave the plaintiff a decree.

The defendants appealed to the Subordinate Judge, who held that the suit was barred under s. 13 of the Civil Procedure Code, and refused to go into the other issues.

The plaintiff appealed to the High Court.

Baboo *Chunder Madhub Ghose* for the appellant.

Baboo *Ratneswar Sen* for the respondents.

The judgment of the High Court was delivered by

GARTH, C.J.—In this case the plaintiff sued for possession of certain lands on the allegation that they appertained to a certain taluq, which he had purchased at an auction sale in execution. The defence raised several pleas, one of which was, that the suit was barred by *res-judicata*. The first Court overruled this plea and decided the case upon its merits. The lower Appellate Court, however, has held that the plea of *res-judicata* is fatal, and has dismissed the suit on that ground.

The plaintiff appeals to this Court.

Now, what appears to have taken place in the former suit

is this. In 1878 the present plaintiff framed his plaint on somewhat similar allegations to those in the present case; and the issues framed in that suit related—(1) to the extent of the rights which the plaintiff had actually acquired by his purchase; and (2) to the correctness of the description of the lands sought to be recovered. As to the first point, the Munsiff decided that the plaintiff had purchased the right, title and interest of the judgment-debtors in the entire taluq. But as to the second point, inasmuch as it appeared that some of the defendants, who were part owners of the taluq, and who were proved to be in exclusive possession of specific portions thereof, were not judgment-debtors, and as the plaintiff had not excluded the lands held by those defendants from the property described in his plaint, the Court found itself unable to give the plaintiff any relief, and accordingly dismissed the suit "without prejudice to plaintiff's bringing a fresh suit for possession of the lands of the taluq in suit distinctly ascertained."

Against this decision the plaintiff appealed, and the Subordinate Judge seems to have come to much the same conclusion as the Munsiff. He found that the plaintiff could not get *khas* possession, as he had not specified the lands which were exclusively in the share of the judgment-debtors; and that he could not get a decree for joint possession with the other part owners, because he had not specified the extent of the shares of his judgment-debtors. He, therefore, dismissed the appeal with the remark: "According to the circumstances of the case the plaintiff can bring a fresh suit properly within time."

The effect of the former litigation, therefore, was this. It established the fact, as against some of the defendants in that suit, that the plaintiff had purchased the rights of his judgment-debtors in the entire taluq, and not only in an eight-anna share thereof; and so far that decision is *res-judicata*. But on the further and more important point, *viz.*, as to *what lands* plaintiff was entitled to possession of by virtue of his purchase, the Courts found themselves unable to come to a decision by reason of errors of form in the frame of the suit. They, therefore, refrained from deciding that point, and left it to the plaintiff to bring a fresh suit, framed in such a manner that the Court might be able to

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grant the relief sought. It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues upon the best evidence that the parties could adduce. But we are not prepared to say that the course taken by those Courts was *ultra vires*. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause; and it is clear that a question, which was advisedly left undecided in the former suit, cannot be said to have been *heard* and *finally decided* within the meaning of s. 13 of the Code.

As we understand, the plaintiff has now come into Court "with a plaint corrected according to what the Munsiff had shown to be essential to his success," and the first Court has been able to give a decree upon that plaint.

The lower Appellate Court has refused to try the case upon its merits, having found the issue as to *res-judicata* against the plaintiff. We think that this judgment must be set aside, and the case remanded to the lower Appellate Court for trial of the remaining issues. The costs of this appeal will follow the result.

Case remanded.

PRIVY COUNCIL.

P.C.* 1884 *February* 21.

GURUDAS PYNE AND RAM NARAIN SAHU.

[On appeal from the High Court at Fort William in Bengal.]

Limitation Act, IX of 1871, *Sch. II, Arts.* 48, 60, *and* 118.

The defendant, as an agent, sold goods entrusted to him by his principal, who died after a decree had been made against him for their conversion; and, as agent for the representative of the deceased, retained the proceeds, which the decree-holder had an equitable right to follow in the agent's hands: *Held*, that neither Art. 48 of Sch. II of Act IX of 1871, fixing the limitation of three years to suits for moveable property acquired by dishonest misappropriation or conversion, nor Art. 60 of the same schedule, fixing the limitation of three years to suits for "money payable by the defendant to the plaintiff," and to suits "for money received to the plaintiff's use," were applicable to the present suit; but that, as a suit for

* *Present:* SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.