

an order of this kind has been made against a husband who is possessed of no means. It would be unreasonable to stay proceedings because a person of no means has not deposited what he has not got. The whole question is, has the petitioner the means wherewith to pay his wife's costs; he himself says in his affidavit he is not able to deposit all the money required; the wife on the other hand says that he is able to do so. The affidavits therefore do not dispose of the matter, so the only course left is to refer it to Mr. Fink to enquire what the petitioner is possessed of. Costs to be costs in the cause. If, however, the respondent should be advised to waive the enquiry, the application will be dismissed, and the costs thereof will be costs in the cause.

1887

 THOMSON
 v.
 THOMSON.
Case referred.

Attorney for respondent: Mr. H. C. Chick.

Petitioner in person.

T. A. P.

 APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

FAZAL RAHAMAN AND ANOTHER (PLAINTIFFS) *v.* IMAM ALI AND ANOTHER (DEFENDANTS).*

1887

 May 18.

Sale for arrears of revenue—Act XI of 1859, s. 36—Certified purchaser, Suit against—Civil Procedure Code—Act XIV of 1882, s. 317.

A, the certified purchaser of a taluk at a sale held under the provisions of Act XI of 1859 for arrears of revenue, and who had obtained symbolical possession, had at the time of the sale agreed with B, the former owner of the taluk, to reconvey to him (B) after the sale had been completed.

In a suit by B to compel specific performance of the contract, alleging that he had never quitted actual possession of the taluk, objection was taken that the suit was not maintainable under s. 36 of Act XI of 1859 and s. 317 of Act XIV of 1882: *Held* that the suit, not being one to

* Appeal from Appellate Decree No. 2022 of 1886, against the decree of Baboo Jibun Kristo Chattopadhyaya, Rai Bahadur, Subordinate Judge of Chittagong, dated the 25th of June, 1886, affirming the decree of Baboo Joy Gopal Singha, Munsiff of South Raojan, dated the 18th of January, 1886.

1887

FAZAL
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IMAM ALI,

oust the certified purchaser from possession, was not barred by s. 36; and that neither was it barred by s. 317 of the Civil Procedure Code, that section applying only to sales in execution of decrees of Civil Courts held under the Procedure Code.

THIS was a suit for specific performance of a contract arising out of the following circumstances: In 1882 a certain taluk belonging to the plaintiffs was put up for sale for arrears of Government revenue under the provisions of Act XI of 1859, and was purchased by the defendants Nos. 1 and 2. The plaintiffs alleged that the defendant No. 2 was their mukhtear; that at the time of the sale an agreement had been come to between them and the defendants that the property in question should be purchased in the name of the defendants but with the money of the plaintiffs; and that after the completion of the purchase the property should be re-conveyed to the plaintiffs.

Subsequently to the sale symbolical possession was given to the defendants; but the plaintiffs alleged that they nevertheless were in actual possession of the taluk "as heretofore," notwithstanding the sale and the delivery of symbolical possession to the defendants. In accordance with the agreement defendant No. 2 executed a reconveyance in favor of the plaintiffs, in which, however, the defendant No. 1 refused to join, denying the plaintiffs' right to the taluk. In this suit, brought for specific performance of the agreement, the plaintiffs prayed for—(1) specific performance; (2) for a declaration of their rights as owners of the taluk; and (3) for confirmation of possession. The defendant No. 1 relied on s. 317 of Act XIV of 1882 and s. 36 of Act XI of 1859 as a bar to the suit. The Munsiff dismissed the suit on the defence raised; and on appeal the Subordinate Judge affirmed the Munsiff's decision.

On appeal by the plaintiffs to the High Court—

Moulvi *Mahamed Yusuf* appeared for the appellants.

Mr. *R. E. Twidale* for the respondents.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

GHOSE, J. (who after stating the facts continued as follows).—We think that s. 317 of the Code of Civil Procedure has no application to the present case. Upon an examination

of the Code it will be found that the preceding section, that is s. 316, refers to sales of immovable property held under the provisions of the Code, and it provides that after a sale has become absolute a certificate of sale is to be given to the purchaser; and then s. 317 provides that "no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims." It will be observed that ss. 316 and 317 find their place in the chapter on Execution of Decrees, Part G. of which is headed "Of Sale and Delivery of Property," that is to say, sales in execution of decrees of Civil Courts, and therefore it is obvious that s. 317 can have no application to any other kind of sale than sales in execution of decrees of Civil Courts held under the Procedure Code. That being so, it seems to us that we must decide this case with reference to the provisions of Act XI of 1859, under which the sale with which we are concerned took place.

Now s. 36 of that Act runs thus: "Any suit brought to oust a certified purchaser as aforesaid, on the ground that the purchase was made on behalf of another person not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

The question that arises upon this section is, whether or not the present suit is a suit to oust the certified purchaser. Now, looking at the plaint (and for the purpose of the question we have before us we must confine ourselves chiefly to the plaint), it is quite clear that this is not a suit to oust the certified purchaser; for what the plaintiffs allege is that they are in possession, and all that they seek by this suit is to have specific performance of the contract that was entered into between them and the defendants at the time when the sale took place. And it seems to us to be also equally clear that the result of a decree, if made in favor of the plaintiffs, would not be to oust the defendants; for the plaintiffs would not be entitled, in execution of the decree, to be put in possession of the property in question.

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That being so, it appears to us that the present suit is not barred by the provisions of s. 36 of Act XI of 1859, and, unless it be clearly shown to come within the scope of that section, we should not be justified in dismissing it on the ground taken by the lower Courts. For these reasons, we think that the decrees of the Courts below must be set aside, and the case remanded to the Court of first instance to be tried upon its merits. The costs will abide and follow the result.

T. A. P.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Norris.

FAKIR CHAND AUDHIKARI AND OTHERS (DEFENDANTS)
 v. ANUNDA CHUNDER BHUTTACHARJI AND OTHERS (PLAINTIFFS).*

1887
 May 17.

Declaratory decree—“ Further Relief ”—Arrears of Rent—Specific Relief Act (Act I of 1877), s. 42—Second appeal—New point.

In a suit for a declaratory decree in respect of plaintiffs' right to certain land where it appeared that rent was due to the plaintiff in respect of such land, if his case were a true one, and where such rent was not claimed: *Held*, that the “further relief” referred to in the proviso to s. 42 of the Specific Relief Act is further relief in relation to “the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying,” and does not include a claim for arrears of rent.

On second appeal the appellant should not be allowed to raise an entirely new point if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts, and capable of being determined without the consideration of any evidence other than that on the record, and even if it falls within the above exception it is purely discretionary with the Court whether to consider it or not.

THE facts which rise to this appeal were as follows:—

100 bighas 14 chittaks of debutter land belonged to one Gobindaram Audhikari as shebait, and on his death the same were inherited by his two sons Shafalram and Shagur Churn.

* Appeal from Appellate Decree No. 2078 of 1886, against the decree of Baboo Kedar Nath Mojumdar, Subordinate Judge of Midnapur, dated the 18th of August, 1886, affirming the decree of Baboo Chundi Churn Sen, Munsiff of Midnapur, dated the 31st of July, 1885.