

1904  
May 6.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkit*

GANGA GHULAM (PLAINTIFF) v. TAPESHRI PRASAD

AND ANOTHER (DEFENDANTS).\*

*Act No. I of 1877 (Specific Relief Act), section 42—Suit for declaratory decree—Further relief—Cancellation of document.*

The plaintiff came into Court alleging that he was the owner and in possession of a certain house of which one of the defendants had executed a mortgage in favour of the other defendant: that the defendant mortgagee had filed a suit, and having obtained a decree for sale, had caused the property to be proclaimed for sale. The plaintiff asked for a declaration that the house was not liable to sale in execution of the decree obtained by the first defendant.

*Held* that section 42 of the Specific Relief Act was no bar to the suit, the plaintiff not being obliged to seek any other relief (as, for example, cancellation of the deed of mortgage) than that which he had claimed.

THE plaintiff in this case came into Court asking for a declaration that a certain house was not liable to sale in execution of a decree obtained by the defendant Tapesri Prasad against the other defendant Musammat Sheo Kunwar. The plaintiff stated that the house was his own, that he was in possession of it, and that Musammat Sheo Kunwar had executed a mortgage of it in February 1897 in favour of Tapesri Prasad. The plaintiff alleged that this mortgage was made without any title whatsoever on the part of the mortgagor. He further stated that Tapesri Prasad had instituted a suit on this mortgage, and having obtained a decree, had caused the house to be proclaimed for sale. The Court of first instance (Subordinate Judge of Cawnpore) gave the plaintiff the decree asked for. The District Judge, however, on appeal by Tapesri Prasad set aside the decree of the first Court and dismissed the suit on the ground that in view of section 42 of the Specific Relief Act, 1877, the plaintiff could have asked for further relief, that is to say, for the cancellation of the sale-deed, but had not done so. From this decree the plaintiff appealed to the High Court.

*Pandit Sundar Lal and Munshi Gokul Prasad, for the appellant.*

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\* Second Appeal No. 952 of 1902, from a decree of H. O. W. Roberts, Esq., District Judge of Cawnpore, dated the 3rd of September 1902, reversing a decree of Munshi Sheo Sahai, Subordinate Judge of Cawnpore, dated the 12th of September 1901.

Pandit *Moti Lal Nehru* and *Munshi Satya Narain*, for the respondents.

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STANLEY, C.J. and BURKITT, J.—The relief sought by the plaintiff in the suit out of which this appeal has arisen was a declaration that a certain house was not liable to sale under a decree obtained by the defendant *Tapeshri Prasad* against the other defendant *Musammat Sheo Kunwar*. The allegations of the plaintiff are that the house in question is his own, that he is in possession of it, and that *Musammat Sheo Kunwar*, who is his uncle's wife, thought fit to execute a mortgage of that house in February 1897 to the defendant *Tapeshri Prasad*. The plaintiff alleges that the mortgage was made by the mortgagor without a shadow of title. The mortgagee *Tapeshri* instituted a suit on the mortgage, and having obtained a decree for sale, had the property proclaimed for sale, and thereupon the plaintiff here instituted a suit as provided by section 42 of the Specific Relief Act for the purpose of obtaining from the Court the declaration we have mentioned above. The first Court gave him a decree according to his prayer. The learned District Judge, however, has reversed that decree. He finds the facts in favour of the plaintiff respondent before him, but goes on to say, with reference to the wording of section 42 of the Specific Relief Act:—"Plaintiff might therefore have sued for cancellation of the mortgage-deed and to have the decree based on the mortgage-deed set aside." "These," he says, "are the real reliefs to which he is entitled and for which he could have sued." Then, as the plaintiff did not ask "for those reliefs," the learned District Judge dismissed the suit. In so doing we are of opinion that the District Judge was entirely wrong. There was no obligation on the plaintiff, even under the proviso to section 42, to have sued to set aside either the mortgage or the decree, and, indeed, it is doubtful in our opinion if he had asked for such reliefs that he could have succeeded. All that the plaintiff wanted, and all that the law compelled him to ask for, was to have the cloud on his title, which was caused by his property being proclaimed for sale, removed, and to achieve that it was not necessary to ask for any further relief. The plaintiff was in possession of the property in suit,

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and if third parties having no interest in that property chose to amuse themselves by executing mortgage-deeds or sale-deeds or the like of that property, it is no concern to the real owner until they do some act which puts his title in danger, as here, *e.g.*, by advertising the property for sale. When that occurs the plaintiff is entitled to come in with a suit under section 42 of the Specific Relief Act. For the above reasons we must allow this appeal and set aside the appellate decree of the District Judge. We remand the record to him under section 562 of the Code of Civil Procedure, as he has decided the appeal on a preliminary point, and we direct that the appeal be replaced on the file of pending appeals and be decided according to law. The appellant will have his costs of this appeal in any event.

*Appeal decreed and cause remanded.*

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May 9.

*Before Mr. Justice Know and Mr. Justice Aikman.*

NAND KISHORE (OBJECTOR) v. SIPAHI SINGH (DECREE-HOLDER).  
*Act No. XV of 1877 (Indian Limitation Act), schedule II, article 179 - Execution of decree—Limitation—Application to take some step in aid of execution—Appeal from order in execution proceedings.*

The prosecution of an appeal from an order made in the course of proceedings in execution of a decree cannot be looked on as an application in accordance with law to the proper Court for execution or to take some step in aid of execution within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877. *Kristo Coomar Nag v. Mahabat Khan* (1) followed.

In this case one Sipahi Singh, on the 17th August 1896, obtained a decree under section 88 of the Transfer of Property Act, 1882, for the sale of two houses and a *diwan-khana*. This decree was followed on the 14th of April 1897 by an order absolute for sale. On the 26th of May 1897 the decree-holder applied for sale of the property, and in his application asked that the two houses should be sold first and afterwards the *diwan-khana*. The owners of the houses objected, and that

\* Second Appeal No. 1024 of 1903, from a decree of T. C. Piggott, Esq., District Judge of Moradabad, dated the 13th of July 1903, confirming a decree of Babu Mata Prasad, Subordinate Judge of Moradabad, dated the 27th of January 1903.