

of it. The date on which the plaintiff did not appear was not the date for the hearing of the suit itself, and the farthest the court could go was to decide the application which had been put before the court and for the hearing of which the 16th of July, 1907, had been fixed. It is contended that the application was not an application under section 103 of Act XIV of 1882. The order of the learned Subordinate Judge answers that contention fully. He evidently considered it, as his judgement shows, a case to be dealt with under section 102. We allow the appeal; set aside the order passed on the 6th of February, 1909; allow the application for restoration of the case, and direct the court below to restore the suit under its original number and proceed to hear it according to law. The costs will abide the event.

*Appeal allowed.*

*Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Richards.*

KESRI AND OTHERS (PLAINTIFFS) v. GANGA SAHAI AND OTHERS (DEFENDANTS).

*Execution of decree—Joint decree-holders—Application for execution by one on behalf of himself and others—Leave to bid obtained for himself—Purchase by the applicant alone—Rights of co-decree-holders in respect of property so purchased.*

One of several joint decree-holders made an application for execution on his own behalf and on behalf of his co-decree-holders, and then alone obtained leave to bid for the property, and purchased it, the purchase money being equal to the amount of his share of the decree. *Held*, in a suit by the co-decree-holders to recover their shares of the property so purchased, that they were entitled to recover, the equity being on the side of the plaintiffs.

THIS was a re-hearing, on an application for review of judgement, of First Appeal No. 58 of 1907, decided by the same Bench on the 9th of April, 1910, and reported in I. L. R., 32 All., 541.

The facts, so far as they are material to the present decision, were as follows:—A mortgage deed was executed in favour of Debi Din and Bahadur, jointly. Their shares in the mortgage money were, approximately, two-thirds and one-third respectively. The mortgagees obtained a decree for sale. The respondent No. 1, heir of Debi Din, alone applied for execution of the decree; the heirs of Bahadur did not join in the application. It was

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prayed that the decree might be executed subject to the rights of the heirs of Bahadur. Subsequently, leave was asked for and obtained by the respondent No. 1, to bid at the auction sale of the mortgaged property and he purchased two villages for the sum of Rs. 26,000. This sum was approximately two-thirds of the amount then due upon the decree. The heirs of Bahadur then sued him for possession of their one-third share of the villages; his defence was that he had purchased the villages for himself, and all that the plaintiffs could get was a one-third share of the purchase money. This was the matter for determination at the re-hearing of the appeal upon an application by the respondent No. 1 for review of judgement.

Babu *Jogindro Nath Chaudhri* (with him Mr. *W. Wallach* and Pandit *Mohan Lal Nehru*), for the respondent No. 1:—

The purchase by Ganga Sahai, the respondent No. 1, of the villages for Rs. 26,000 just satisfied his two-thirds share of the decretal amount. The decree was, no doubt, executed by him subject to the rights of the other decree-holders, but the question is how far the "benefit" of that execution extends under section 231 of the old Code. It extends only to the recovery by them of the money due to them. They cannot follow the property, but they are, of course, entitled to their share of the purchase money. Before Ganga Sahai obtained leave to bid at the auction sale, all steps which had up to that time been taken by him for execution of the decree must be deemed to have been for the decree as a whole, that is, for them all. But his character as a decree-holder executing the decree for himself and his co-decree-holders altered when he obtained leave to bid. Thenceforth his character was the same as that of a stranger purchasing the property. There was no relation of agent or trustee. There are certain relations in which the benefit must be deemed to enure for them all; for example, the case of a member of a joint Hindu family purchasing with the joint family funds. But the analogy does not apply to this case; for, although the money was advanced by Debi Din and Bahadur jointly, there was a clear specification of their respective shares both in the mortgage-deed and in the decree for sale.

The Hon'ble Pandit *Sundar Lal* (with him the Hon'ble Pandit *Mulan Mohan Mahviya*), for the plaintiffs appellants, was not called upon.

KNOX, BANERJI and RICHARDS, JJ.—On the 9th of April, 1910, we allowed the appeal in this case, and, setting aside the decree of the court below, decreed the plaintiffs' suit with costs. After we had made our decree, Ganga Sahai, one of the respondents, asked us to review our judgement of the 9th of April, 1910, on the ground that the only question which had been argued before us was the pure question of law that arose in the case, and that other questions arising in the case had not been heard and decided. We issued notice to the appellants to show cause why this application should not be granted. No cause having been shown, we allowed the application and directed that the appeal be put up for hearing. To-day the learned advocate for Ganga Sahai, respondent, tried to support the decree of the court below on the ground that the property in suit was purchased by Ganga Sahai for himself, and the plaintiffs had no title to the same. We find that the issue thus raised was dealt with by the learned Subordinate Judge and his judgement on this point will be found at page 12 of the paper book in F. A. No. 57 of 1907. We agree entirely with what the learned Subordinate Judge there held and adopt the view taken by him. There is no question whatever that the equity in this case lies on the side of the plaintiffs.

A further plea was raised based on section 317 of Act XIV of 1882. This plea was not taken in the court below and in our opinion is entirely without substance. This is not the case of a *benami* purchaser.

No other point was pressed before us.

The appeal is allowed, the decree of the court below is set aside and the plaintiff's suit is decreed with costs in both courts.

*Appeal allowed.*

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