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to say they are not entitled to some weight. His reasons for not relying upon the evidence of Babu are justified, though he has failed to consider the corroboration of Hub Lal on the only vital part of his evidence. We are very far from saying that we believe Ghure to be innocent, far less that the conviction of the other accused was incorrect. But deciding this case entirely upon its own circumstances, and influenced mainly by the remarks of so experienced a Judge on the unsatisfactory way in which the principal witness gave his evidence, we have with great hesitation come to the conclusion that we ought not to set aside the verdict of acquittal given by the learned Sessions Judge. We accordingly dismiss the appeal. The accused, if in custody, will be set at liberty.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MATA PALAT AND OTHERS (JUDGEMENT-DEBTORS) v. BENI MADHO
(DECREE-HOLDER) *

Civil Procedure Code (1882), sections 373 and 375 A—Exemption of decree—Procedure—Leave to withdraw with permission to make a fresh application not permissible with regard to proceedings after decree.

Held that the provisions of Chapter XXII of the Code of Civil Procedure (1882), which allowed withdrawal of a suit with permission to bring a fresh suit, did not apply to any application subsequent to the decree, and did not permit the withdrawal of an application for execution with permission to make a fresh application.

THIS was an appeal arising out of an application made by the decree-holder to put up for sale certain interests held by the judgement-debtors as included in the decree for sale. The judgement-debtors contended that the decree for sale included only their proprietary rights and not their mortgagee rights. They further contended that on the 6th of August, 1908, the decree-holder's application for sale of the mortgagee rights was on their objection disallowed by the court of first instance on the 22nd of August, 1908; that an appeal against the order, by the decree-holder, was dismissed on the 15th of December, 1909, and that therefore that order had the effect of *res judicata*. The decree-holder in reply

* Appeal No. 70 of 1913, under section 10 of the Letters Patent.

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pointed out that, pending the appeal against the order of the 22nd of August, 1908, an application was made to the appellate court for leave to withdraw with liberty to make a fresh application and therefore the order was not final. The courts below dismissed the decree-holder's application. On second appeal the following order was made by a single Judge of the Court :—

“ My judgement in Revision No. 75 of 1912 should be read with the present judgement. The decree-holder, who is appellant, is now seeking to bring to sale the mortgagee rights which his judgement-debtors had in the villages scheduled in the decree and which were mortgaged to him. The lower appellate Court held that the decree-holder who had only got a decree for the sale of zamindari rights and not of the particular rights which he now in this application for execution wishes to bring to sale was not entitled to sell the latter rights. It, therefore, dismissed the application for execution confirming the order of the court below. In the appeal before me four grounds were taken in the memorandum of appeal, and in accordance with the view I have already taken in the other case I hold that the decree-holder is empowered by the decree to bring to sale the mortgagee rights over which he is seeking to enforce his decree. I find, however, that in the court of first instance it was contended that the application for execution was barred by limitation, and that in the previous execution proceedings the property now sought to be sold had already been released from attachment as not being liable to sale. These questions were not gone into. They are really questions of law and can be decided here, and I think it expedient to bring this litigation as far as possible to an end. I accordingly allow the parties two weeks in which to prepare for argument on these two points and my order will be subject to my decision on these two points.”

The case again coming up, the following judgement was delivered :—

“ In my order of the 14th of January, 1913, I put an interpretation upon a decree. It was, however, next pointed out that two pleas which had been taken in the court below had not been considered by the Court. They were pleas raising important legal points. One was to the effect that the application for execution of this decree was barred by limitation. The second was that in the previous execution proceedings the property now sought to be sold had already been released from attachment and was not liable to sale. The first question, i.e., that limitation bars the application is not now pressed.

The second plea is based upon a paper which is to be found on the record as Paper No. 101, File A. In that paper the court executing the decree had disallowed an application to have the proclamation of sale amended so as to include mortgagee rights, it disallowed this application on the ground that a court executing a decree could not place this interpretation upon the decree before it. An appeal was filed and the order of the court executing the decree was upheld on the 15th of December, 1908 (Paper No. 117 A). This paper No. 117A must be read with Paper No. 116 A. When these two are read together the ground that the matter has already been decided is immediately cut away. Both

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these pleas fail and my order of the 14th of January will stand without any limitation. The result is that this appeal is allowed and the order of the court of first instance and that of the lower appellate Court are set aside and the proceedings in execution will go forward as prayed. The appellant will get his costs of this appeal and the costs of the courts below."

The judgement-debtors filed an appeal under the Letters Patent.

Babu *Piari Lal Banerji*, for the appellants :—

The order in the earlier proceeding, dated the 22nd of August, 1908, which was confirmed on appeal, concludes the present question. The order above referred to, passed in execution proceedings, remained operative until it was set aside on appeal, and mere fact that pending the appeal in the appellate Court an application was made to withdraw had not, and could not have, the effect of nullifying the first order. Moreover, the Code then in force and the present Code did not allow applications for withdrawal in execution proceedings. He referred to section 375 A. of Act XIV of 1882 and order XXIII, rule 4, of Act V of 1908.

Mr. *B. E. O'Connor* (with him Mr. *A. H. C. Hamilton* and Mr. *Nihal Chand*), for the respondent :—

When the application for withdrawal was made by the decree-holder to the appellate Court the judgement-debtors clearly intimated to the court that they had no objection to the prayer for leave being granted and the court then allowed the leave prayed for. Under such circumstances they should not now be allowed to plead that the order of the first court was affirmed on appeal.

Babu *Piari Lal Banerji* not heard in reply.

RICHARDS, C. J., and BANERJI, J:—This is a judgement-debtor's appeal. The suit was brought on foot of a mortgage, dated the 9th of June, 1895. This mortgage was a mortgage of the zamindari rights and also of mortgagee rights. A decree was obtained in 1900. Applications were made from time to time for the execution of the decree, and in the first place apparently the application for execution was limited to an application for sale of the zamindari rights mortgaged. This very probably was the case, because at that time it had been held that mortgagee rights could not be sold in execution of a mortgage decree. In the year 1908 the decree-holder applied for a sale of the mortgagee rights and asked the court executing the decree to put into the sale

proclamation a statement to the effect that the mortgagee rights were being sold. Rightly or wrongly, that court decided that the decree did not include the mortgagee rights and refused the application. The decree-holder appealed, and on the case coming before the court of appeal an application was made for leave to withdraw the appeal with liberty to make a fresh application in execution. The representative of the judgement-debtors is recorded to have said that he had no objection so long as he got his costs. The decision of the court below was affirmed and the appeal dismissed with costs. The matter rested there until a further application was made by the decree-holder for the sale of the mortgagee rights. This was met with the objection first that the decree did not include mortgagee rights, and secondly, that it had already been held that the decree did not include mortgagee rights, and that order had become final. The lower appellate Court allowed the second objection and dismissed the application for execution. In Second Appeal to this Court the learned Judge held that the decree was sufficient to include the mortgagee rights, and that having regard to the circumstances connected with the application to withdraw the appeal, the present application for execution was maintainable.

We are not inclined to agree with the learned Judge of this Court that the decree was sufficient to include the mortgagee rights. On the other hand we think that, when the court executing the decree rejected the application to sell the mortgagee rights and held that they were not included in the decree and so not liable to be sold, that order was final unless it was set aside upon appeal. It never was set aside upon appeal. On the contrary it was affirmed and the appeal was dismissed. It is suggested that the provisions of Chapter XXII of Act No. XIV of 1882 permitted the withdrawal of the application for execution and gave a right to make a fresh application. It will be seen by reference to section 375 A that the provisions of that Chapter did not apply to any application subsequent to the decree.

We must allow the appeal, and, setting aside the decree of this Court, restore the decree of the lower appellate Court with costs of both hearings in this Court.

Appeal allowed.

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