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circumstances to receive any declaration whatsoever. It is an absurdity to declare that the plaintiffs will be the owners of the property after the death of Musammat Dhanno. It is impossible to predict that they will be alive at the time of her death, and no such declaration can or ought to be granted. As regards the declaration that Musammat Ganga's possession is not and cannot become adverse as against the plaintiffs, there is no need for any such declaration at all. It is a question of law which has been repeatedly decided that possession taken by a trespasser during the life-time of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow, but the courts in this country do not grant declarations on points of law simply for the convenience of parties. Thirdly, as regards the will executed by Musammat Ganga, the declaration in respect thereto is a declaration which ought not to be granted. We would refer to the decision in the case of *Umrao Kunwar* v. *Badri* (1) and also to the remarks of their Lordships of the Privy Council in the case of *Jaipal Kunwar* v. *Indar Bahadur Singh* (2). We do not think it is necessary on this branch of the case to make any further observations. It is obvious that the declaration which the court below sought to grant ought not to be given any more than the absurd declaration which was entered in the decree. We allow the appeal; set aside the decree of the court below and restore that of the court of first instance. The appellant will have his costs in all courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

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DILDAR HUSAIN AND ANOTHER (DEFENDANTS) *v.* SHEO NARAIN AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (1908), *order XXI, rule 57—Execution of decree—Sale in execution—Sale set aside—Order purporting to maintain attachment—"Default" of decree-holder.*

In execution of a decree the whole of a house was sold by auction instead of a share therein which alone was saleable in execution of the decree. Various objections were raised and in the end the court executing the decree passed

* First Appeal No. 64 of 1918, from an order of E. H. Ashworth District Judge of Cawnpore, dated the 6th of April, 1918.

(1) (1915) I. L. R., 37 All., 422 (2) (1903) I. L. R., 26 All., 238.

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the following order:—"The sale is set aside; the application for execution is struck off. The attachment will remain." Further applications were made for the execution of the decree, but they did not relate to the house in question. As the result of these execution proceedings the decree was satisfied in part and the papers were sent back to the court which passed the decree. Later on the decree-holder applied for the execution of the decree by sale of a part of the house. In the interval between this application and the time when the decree was sent back to the court which passed it, the judgment-debtor had sold the property to the plaintiffs. The plaintiffs objected to the application for execution that they were the owners of the house and it was not saleable:—*Held* that the attachment had come to an end on the decree-holders' application being struck off, and that a good title had passed to the plaintiffs by the sale. The word "default" used in order XXI, rule 57, of the Code of Civil Procedure is not restricted to default of appearance or matters of that description. It means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. *Namuna Bibi* v. *Rosha Miah* (1) followed. *Valiakath Puthiah* v. *Manakkal Parameswaran* (2) and *Karaturi Satyanarayana* v. *Gopisetti Narayana Swami Naidu Garu* (3) dissented from.

THE facts of this case are fully stated in the judgment of TUDBALL, J.

Pandit *Kailash Nath Katju*, for the appellants.

Mr. *N. C. Vaish*, for the respondents.

RICHARDS, C. J.:—This appeal arises under the following circumstances. Certain property was attached in execution of a simple money decree as far back as the year 1914. Various objections were raised. The property, which consisted of a house, had been sold and purchased by an auction purchaser. It turned out that the whole house should have not been sold. The auction purchaser naturally complained that he had bid for a whole house and not a part of a house, and in the end an order was made by the court executing the decree to the following effect: "The sale is set aside. The application for execution is struck off. The attachment will remain." Further applications were made for execution of the decree, but no application was made in respect of the property now in dispute, which consists of a part of the house to which we have already referred. Eventually, in the year 1916, a further application in execution was made and it was asked that portion of the house should be sold. An objection was raised on behalf of the respondent,

(1) (1911) I. L. R., 38 Calc., 482. (2) (1915) 35 Indian Cases, 240.

(3) (1916) 38 Indian Cases, 300.

Sheo Narain, that he had purchased a portion of the house in the year 1916. The decree-holder replied that the attachment was still subsisting and that therefore the judgment-debtor could convey no title to Sheo Narain as against the decree-holder. This contention met with the approval of the court of first instance. In appeal the learned District Judge held that no attachment as against the property was subsisting in the year 1916 when the sale was made. He therefore remanded the case in order that the court below might try whether or not the sale was a *bonâ fide* sale to Sheo Narain, and other issues. The present appeal is against the order of remand, and it has been strenuously urged that the attachment still subsisted in 1916 by virtue of the order that was made in the year 1914 to which we have already referred. I think the view taken by the lower appellate court was correct. Rule 57 of order XXI of the Code of Civil Procedure is as follows :—

"Where any property has been attached in execution of a decree but by reason of the decree-holder's default the court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

In my opinion the order of the court below amounted to a dismissal of the application for execution. It certainly was not an adjournment. It therefore seems to me to follow that if the application can be said to have been dismissed by reason of the "decree-holder's default," the attachment ceased upon the dismissal of the application. It is contended that there was no "default" on the part of the decree-holder. In the present case it seems to me that there clearly was a default. The decree-holder, owing to the confusion as to the property and the sale, was unable to proceed with that application and was determined to make a fresh application for execution in respect of this property if so advised, which fresh application he eventually made. It was contended that the "default of the decree-holder" means only those cases in which the decree-holder fails to put in an application or fails to deposit fees or some such matter, and in support of this contention the following cases have been

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quoted:—*Karaturi Satyanarayana* v. *Gopisetti Narayana Swami Naidu Garu* (1) and *Valiakath Puthiah* v. *Manakkal Parameswaran* (2). I see no reason why this restricted meaning should be given to the words in the rule. Previous to the passing of the present Code of Civil Procedure, there was considerable conflict as to the effect of "striking off," or, in other words, dismissing an application for execution. It was to put an end to this conflict that an alteration was made by the present Code. The exact point arose in the case of *Namuna Bibi* v. *Rosha Miah* (3), in which case I think it was rightly decided that the words in the rule were not restricted to default of appearance or matters of that description. It really means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. I am supported in this view, I think, by the provision in the rule itself that in a fitting case the application for execution can be adjourned, in which case of course the attachment could be maintained. I would dismiss the appeal.

TUDBALL, J.—I fully agree. I think a little more stress should be placed upon the actual facts of this case. The whole house was sold by mistake instead of only a share therein on the 24th of October, 1914. The sale was set aside at the request of all the parties concerned. This decree had been originally passed in the Court of Small Causes at Lucknow, and it had been transferred for execution to the court of the Munsif in Cawnpore. When the sale was set aside the Munsif called upon the decree-holder to proceed with his application. In reply to this on the 10th of December, 1914, the decree-holder said:—"Let the execution case be dismissed but the attachment be maintained. I will put in another application afterwards so that there will be no legal difficulty." The court thereupon passed the order as asked by the decree-holder:—"The execution case is struck off, the attachment maintained and the costs will be borne by the judgment-debtor." After this the Munsif returned the decree as unexecuted to the Lucknow court. The decree-holder again applied to the Lucknow court to transfer the decree for further

(1) (1916) 38 Indian Cases, 300. (2) (1915) 35 Indian Cases, 240.

(3) (1911) I. L. R., 38 Calc., 482.

execution. A fresh certificate was sent. On the 21st of January, 1916, a fresh application for execution was made for the attachment of a sum of Rs. 250 belonging to the judgment-debtor in the hands of a pleader. The case was transferred to the Small Cause Court, the sum was realized and the application for execution was struck off on the 8th of March. On the 14th of March another fresh application for execution was made for attachment and sale of certain movable property. The decree was further partially satisfied and that application for execution was struck off on the 31st of April, 1916. Again, the papers were returned to the Lucknow court. Then the property now in dispute was sold by the judgment-debtor to the present respondent. The decree-holder then applied for fresh execution of his decree and he asked to have the share in this house sold. To my mind it is clear and beyond all doubt that the decree-holder in December, 1914, did not wish to proceed further with his then pending application for execution, and it was in fact dismissed by reason of this default in carrying on proceedings. To my mind order XXI, rule 57, clearly and distinctly applies to the present case. The fact that the court in dismissing the application said the attachment should continue makes no difference. The law distinctly says that in these circumstances the attachment shall cease. The decision in *Aziz Bakhsh* v. *Kaniz Fatima Bibi* (1), a decision to which I myself was a party, is placed before me in support of the present appeal. It clearly does not apply, nor is there any discussion in my judgment of the meaning of the word "default." What is said in that judgment cannot be divorced from the facts of that case. In that case there had been a wrong order passed by the High Court dismissing an application for execution. That order was subsequently set aside on review, with the result that the application for execution was never dismissed at all. The ruling has no application to the circumstances of the present case.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

(1) (1912) I. L. R., 34 All., 490.