Before Mr. Justice Sulaiman and Mr. Justice Gokul Prasad.

1920
July, 19.

RAMANAND AND OTHERS (PLAINTIFFS) *v.* JAI RAM AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *section* 47—*Decree for possession—Possession not obtained either by execution or by private arrangement—Execution of decree barred by limitation—Suit for possession based on decree not maintainable.*

On the 28th of April, 1905, the plaintiffs obtained a decree in a suit for pre-emption conditional on their paying Rs. 1,000 within three months from the date of the decree. The money was paid, but, for one reason or another, the plaintiffs did not get possession of the property either by process in execution, or by private arrangement. On the 25th of April, 1917, the plaintiffs sued for possession of the property awarded to them by the decree of 1905.

Held that the suit was barred by section 47 of the Code of Civil Procedure. *Dhanraj Singh* v. *Lakhrani Kuar* (1) discussed and distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Gulzari Lal* and *Piari Lal Banerji*, for the appellants.

Munshi *Girdhari Lal Agarwala*, for the respondents.

SULAIMAN and GOKUL PRASAD, JJ.:—This appeal has been referred to a Division Bench, as the learned Judge before whom it originally came on for hearing doubted the correctness of the rule of law laid down in *Lakhrani Kuar* v. *Dhanraj Singh* (1). As all the authorities did not seem to have been laid before us in argument we took time to consider our judgment.

It appears that in 1905 the present plaintiffs brought a suit against these very defendants to pre-empt the property which is now in dispute. On the 28th of April, 1905, a compromise decree was passed, according to which the plaintiffs were to obtain possession of the property if they paid Rs. 1,000, within three months of the decree; in case of default the suit was to stand dismissed. The plaintiffs paid that amount within the specified period, but did not obtain possession either through the court or privately. On the 25th of April, 1917, long after the period of limitation for an application for execution had expired, but within twelve years of the decree, the plaintiffs instituted the suit out of which this appeal has arisen for recovery of

* Second Appeal No. 1461 of 1917, from a decree of E.E.P. Rose, Additional Judge of Mainpuri, dated the 8th of September, 1917, reversing a decree of Vishnu Ram Mehta, Munsif of Shikohabad, dated the 25th of May, 1917.

(2) (1916) I. L. R., 38 All., 503.

possession of the property decreed to them previously. The court of first instance, after much hesitation, felt bound to follow the case referred to above and decreed the suit. The lower appellate court has refused to follow it in view of certain observations made in the Letters Patent appeal from it. In that case a single Judge of this Court had held "the plaintiff while in possession of the land in question was wrongfully dispossessed by the defendant and I hold that the plaintiff is entitled to succeed on that ground." This was perfectly correct. He, however, went on to hold that even apart from that the plaintiff was entitled "to sue and succeed" upon the previous decree.

In an appeal under the Letters Patent, *Dhanraj Singh* v. *Lakhrani Kuar* (1), it was held that the plaintiff having got actual possession, though out of court, and having been subsequently dispossessed, was entitled to bring a fresh suit. The learned Judges, referring to the view that it is always open to a decree-holder to bring a suit on the decree at any time within twelve years, notwithstanding that the decree has become incapable of execution by lapse of time, remarked :—"This dictum, if correct, would mean that suit after suit could be brought upon barred decrees. If this is correct law, it is a very alarming situation." They were inclined to hold that section 47 of the Code of Civil Procedure would be a bar to such a suit, but did not think it necessary to say anything further, as the point was not necessary for the decision of that case and the question had not been fully argued before them.

There can be no doubt of the general principle that "where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained"; *per* Baron PARKE in *Williams* v. *Jones* (2). The same principle was recognized in Civil Law, where the action founded on the prior judgment was known as the *actio judicata*. Such an action may be treated as another form of execution, but the Legislature may prohibit it and prefer the more summary method. We must, therefore, examine the provisions of the Code of Civil Procedure and also review the

(1) (1916) I. L. R., 28 All., 409. (2) (1845) 67 R. R., 767.

1920

RAMANAND v. JAI RAM.

authorities in order to see how these provisions have been interpreted and applied.

The case of *Doobee Singh* v. *Jowkee Ram* (1) may be put down as the earliest authoritative case of our own provinces. There the plaintiffs had obtained a decree awarding to them one half of an orchard and directing possession to be given to them. They remained inactive for upwards of three years, and then brought a fresh suit for possession. A Full Bench of five Judges enunciated the law as follows:—"Where a decree is merely declaratory and does not require to be carried into effect by process of execution, the right thereby declared and ascertained exists independently of any process for enforcing it. But when the nature of the decree requires that it should be executed, a decree holder cannot, after allowing the limitation period to lapse without issuing process of execution, seek by a fresh suit on the decree to obtain that which he should have sought for by execution."

In *Ram Jus Rae* v. *Ram Narain* (2), two out of the three Judges re-affirmed the same principle and held that section 11 of Act XXIII (to which section 47 of the present Code corresponds) had taken away the right of a decree-holder to recover in a subsequent suit founded on his decree what he could enforce by execution in the ordinary way.

In *Sheikh Ghulam Hosein* v. *Musammat Alla Rukhee Beebee* (3) the same principle was even extended to a redemption suit. A Full Bench of five Judges again laid down that where by a former adjudication persons became entitled to a remedy by process of execution for the recovery of possession, and by their own neglect they have lost this remedy, they cannot be permitted to revert to the position which they held prior to the institution of that suit and to ask for a remedy by suit. The provisions of section 60 of the Transfer of Property Act have perhaps made the principle no longer applicable to redemption suits, vide *Sita Ram* v. *Madho Lal* (4); but we have not been able to find any recent case of our own High Court in which the soundness of that principle has been doubted.

(1) N-W. P., H. C. Rep., 1868, 381.
(2) N-W. P., H. C. Rep., 1870, 382.
(3) N-W. P., H. C. Rep., 1871, 62.
(4) (1901) I. L. R., 24 All., 44.

The Madras High Court has adhered to the same view. In the case of *K. Sanjeeviyah* v. *Nanjiyah* (1) it was held that a suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the mofassil, the right of suit in such a case being taken away by section 11 of Act XXIII of 1861. In the case of *Muttuvelu Pillai* v. *Vythilinga Pillai* (2) it was laid down that that section takes away from the parties the right to try, by a fresh suit, any question relating to the enforcement of the terms of the decree by process of execution, and, in accordance with the whole policy of the law of procedure, makes every such question determinable by an order in a summary proceeding before the same court in the course of execution. And the same principle was followed in the case of *Rangan Asary* v. *Shappani Asary* (3) and in the case of *Sungara Narayana Pillay* v. *Sandira Pillay* (4). In the full Bench case of *Periasami Mudaliar* v. *Seetharama Chettiar* (5), which was not a case of a suit on a judgment, but one to enforce a Hindu son's pious obligation to discharge his father's debts, it was, however, observed on page 249 that "as against the judgment-debtor himself or against his legal representative (who, as such, is equally bound by the judgment) it has long been held that under the Indian processual law the remedy is only by way of execution of the decree, and that no suit could be brought upon the judgment."

Following the old English practice of entertaining suits on judgments of the county courts, a practice at one time grew up in Bombay under which suits on judgments of Small Cause Courts were allowed, till this had to be put a stop to after the enactment of section 94 of Act XV of 1882. But as for suits on decrees of an ordinary Civil Court the Bombay High Court does not appear to have permitted them. In the case of *Muncharam Kalliandas* v. *Bakshe Saheb* (6) a suit for possession which had been granted by an unexecuted decree was held not to be maintainable. In the case of *Kisan Nandram* v. *Anandram Bachaji* (7) the plaintiff's father had obtained a

(1) (1869) 4 Mad., H. C. Rep., 453. (4) (1870) 6 Mad., H. C. Rep., 13.
(2) (1870) 5 Mad., H. C. Rep., 185. (5) (1903) I. L. R., 27 Mad , 243.
(3) (1870) 5 Mad., H.C. Rep., 375. (6) (1869) 6 Bom., H. C. R., 231
(7) (1873) 10 Bom., H. C. R. 433.

1930

RAMANAND v. JAI RAM.

decree for possession which, however, was never executed. It was held that the remedy by a separate suit was barred by section 11 of Act XXIII of 1861. In the case of *Sayad Nasrudin* v. *Venkatesh Prabhu* (1) it was remarked that section 11 of Act XXIII of 1861, and the decisions under that section, seem to shut a plaintiff, who has failed to obtain execution of a decree in his favour, from making that decree the basis of a further suit or from obtaining, by means of a subsequent suit, that which, by adopting the proper means, he might have obtained in execution; and that the recognition of such suits would tend to prolonged and possibly endless litigation, and so defeat the purpose of the Limitation Act. In the case of *Fakirapa* v. *Pandurangapa* (2) it was pointed out that the practice of the Bombay High Court to entertain suits upon judgments of Courts of Small Causes was peculiar and too long to be disturbed, though it might have been better if such a practice had never been initiated; that it was perhaps based on the fact that the Code of Civil Procedure, with a few unimportant exceptions, had not been applied to the Bombay Court of Small Causes; but that no suit would lie upon a decree the execution of which was barred by limitation. In the case of *Merwanji Nowroji* v. *Ashabai* (3) it was decided that even before the prohibition contained in section 94 of Act XV of 1882, a judgment-creditor in the Court of Small Causes had not the right to sue on his judgment, and that the provisions of the Code of Civil Procedure preclude a judgment in a court regulated by that Code being enforced by a separate suit.

The Calcutta High Court, though formerly upholding the view that no suit on a judgment lies, has subsequently gone back the other way. In the case of *Sandes* v. *Jomir Shaikh* (4) it was held that a suit cannot be maintained in a Small Cause Court to recover the unsatisfied balance of a decree of such court. This was followed in the case of *Moonshi Golam Arab* v. *Currcembux Shaikjee* (7) where it was held that no suit would lie in the High Court on a decree of the Court of Small Causes. A dissenting note, apparently for the first time, was struck by

(1) (1879) I. L. R., 5 Bom., 382. (3) (1883) I. L. R., 8 Bom., 1.

(2) (1881) I. L. R., 6 Bom., 7. (4) (1868) 9 W. R., C. R., 399.

(5) (1879) I. L. R., 5 Calc., 294.

WILSON, J. in *Attermoney Dossee* v. *Hurry Doss Dutt* (1). The learned Judge held that as a general rule a suit lies upon a decree, unless the right is taken away by Statute, and that in his opinion there was nothing in Act X of 1877 to prevent such a suit. It is unfortunate that this case was decided *ex parte*, there being no one on behalf of the respondent to present the contrary view. Neither section 244 (*c*) of Act X of 1877 nor the previous cases seem to have been brought to his notice. This case was followed by another single Judge of the Calcutta High Court in *Annoda Prasad Banerjee* v. *Nobo Kishore Roy* (2), where a suit on an order of the Insolvency Court for payment of costs was held to be maintainable, on the ground that section 244 of Act XIV of 1882 was inapplicable, and that the suit must be held to have been based on a new cause of action as afforded by the previous judgment. In the case of *Ashi Bhusan Dasi* v. *Pelaram Mandal* (3) a decree had been obtained against an alleged adopted son (as the representative of the wrong-doer) under the guardianship of the deceased's widow, but the adoption was found in another suit to be invalid. MUKERJI, J., threw out a suggestion that "the remedy of the decree-holder might possibly be by way of a suit against (the widow) if it be still open to him to sue her successfully in view of the provisions of the Statute of Limitation." In the case of *Kalikanand Mukerji* v. *Biprodas Pal Choudhri* (4) one of the defendants having died, a co-defendant was substituted in his place as his legal representative, and, the plaintiff having refused to make the widow a party, the suit was decreed. In a subsequent litigation it was found that the widow of the deceased was his successor and legal representative. The plaintiff being unable to execute his decree, as the deceased's estate was in the possession of the widow, brought a suit for a declaration that the estate in the widow's possession was liable to pay the decretal amount. It was held that the suit was not maintainable as a suit on a judgment. The case of *Kali Charan Nath* v. *Sukhoda Sundari Debi* (5) was a suit for recovery of money. The defendant died

(1) (1881) I. L. R., 7 Calc., 74. (3) (1913) 18 C. L. J., 362.

(2) (1905) I. L. R., 33 Calc., 560. (4) (1914) 19 C. W. N., 19.

(5) (1915) 20 C. W. N., 58.

1920

RAMANAND v. JAI RAM.

during its pendency, leaving a will whereby he had appointed the wives of his sons executrices to his estate; the plaintiffs, being unaware of the existence of the will, substituted his sons in his place and got a decree. It was held that the executrices were not bound by the decree and the decree could not be executed against the estate in their hands. The learned Judges went on, however, to remark:—"At the same time, it is clear that a suit can be brought against the executrices on the basis of the judgment already obtained," and referred to a number of English and Indian cases, pointing out some divergence of judicial opinion on the matter.

It will be noticed that in both the cases in *Ashi Bhusan Dasi* v. *Pelaram Mandal* (1) and *Kali Charan Nath* v. *Sukhoda Sundari Debi* (2) the remarks of the learned Judges on the point were purely *obiter dicta* and wholly unnecessary for the disposal of those cases. Further, those cases are distinguishable, inasmuch as in each the decree could not possibly be enforced, the real heirs of the deceased not being a party to it. These cases can, therefore, be no authority for the proposition that a second suit on a judgment is maintainable in spite of the provisions of section 47 of the Code of Civil Procedure.

We have given our best consideration to the question before us and we are of opinion that, both on authority and on a correct interpretation of section 47 of the Code of Civil Procedure, the present suit was not maintainable. Stripped of all unnecessary details, the relief claimed by the plaintiffs, in substance, amounts to asking for the fruits of a decree which they are unable to execute owing to lapse of time. The suit, in effect, does raise a question "relating to the execution, discharge or satisfaction" of the former decree and cannot be determined by a separate suit. The plaintiffs' claim in reality is that they obtained a decree for possession of this property, the defendants have not given them possession in spite of the said decree, and therefore the court should compel the defendants to carry out their obligation under that decree. In our opinion such a suit falls clearly within the purview of section 47, and if it did not, we fail to see what other form of suit would.

(1) (1913) 18 C. L. J., 362. (2) (1915) 20 C. W. N., 58.

1920

RAMANAND v. JAI RAM.

We may note that article 122 of the Limitation Act can in no way help the plaintiffs. As was observed in the case of *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami* (1), the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. In fact the Limitation Act *assumes* the existence of a cause of action and does not define or create one.

We think that the decree of the lower appellate court was under the circumstances correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

LACHMAN PRASAD (PLAINTIFF) v. SHITABO KUNWAR (DEFENDANT.)*

1920 July, 21.

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 164 and 201—Suit for profits—Plaintiff a recorded co-sharer at date of suit—Subsequent order of Revenue Court removing plaintiff's name from khewat.

Where at the date of institution of a suit for profits under section 164 of the Agra Tenancy Act, 1901, the plaintiff is a recorded co-sharer, his right to obtain a decree will not be taken away by an order subsequently passed by a Court of Revenue removing his name from the khewat. The presumption raised by section 201 of the Tenancy Act is irrebuttable so far as a Revenue Court is concerned *Durga Prasad* v *Hazari Singh* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju* and Munshi *Damodar Das*, for the appellant.

Dr. *Surendra Nath Sen*, Munshi *Lachmi Narain* and *Shyam Lal*, for the respondent.

TUDBALL and SULAIMAN, JJ.:—Appeals Nos. 1617 and 1618 of 1917 arise out of a suit for profits brought by the plaintiff appellant, Lachman Prasad, who has since died and is now represented by Raja Babu. The original plaintiff sued to recover the profits of a 5 anna 4 pie share in the mahal for the years 1912, 1913 and 1914 against Musammat Shitabo

*Second Appeal No. 1617 of 1917, from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 10th of July, 1917, reversing a decree of Jafar Ali Khan, Assistant Collector, First Class, of Cawnpore, dated the 30th of September, 1915.

(1) (1893) L. R., 20 I. A., 183 (192). (2) (1911) I. L. R., 33 All., 799.