

on the production of any of the three documents mentioned above. It may be pointed out that even a successor to a property by right of survivorship may take out a succession certificate; see *Banwari Lal v. Maksudan Lal* (1).

In the result, the appeal must succeed. The law does not contemplate the dismissal of a suit where a suit has already been instituted. All that it provides against is the passing of a decree without the production of any of the title deeds. In the circumstances, it would not be desirable to dismiss the suit altogether. We should grant the plaintiff respondent some time in order to enable him to produce either a probate or Letters of Administration or a succession certificate, in which last case the debt in question may be specifically mentioned.

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji.*

SAID AHMAD (OBJECTOR) v. RAZA HUSAIN AND ANOTHER  
(DECREE-HOLDERS).\*

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GRESHAM  
LIFE  
INSURANCE  
SOCIETY,  
LTD.  
v.  
COLLECTOR  
OF ETAWAH

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June, 17.

*Civil Procedure Code, section 47; order XXI, rules 97, 98, 103—One defendant exempted from suit but his name not struck off—"Party to the suit" for purpose of section 47—Resistance to execution by him—Section 47 as well as order XXI, rules 97 and 98, applicable to such dispute—Civil Procedure Code, section 128(1)—Conflict between section and rule.*

A defendant was exempted from the suit, but his name continued to be on the record and appeared in the decree, though it was noted that he had been exempted. In execution of the decree the plaintiff sought possession of a house which this particular defendant had claimed to be his own and in respect of which he had been exempted, and the decree-holder was resisted by him. The decree-holder complained to the execution court, and in a summary proceeding that court found that the resistance was made without any

\*Appeal No. 53 of 1931, under section 10 of the Letters Patent.

(1) (1929) I.L.R., 52 All., 252.

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title and at the instigation of the judgment-debtors. The objection was accordingly dismissed and possession was ordered to be delivered. The question was whether an appeal lay from the order. *Held* that the dispute was not merely a matter of resisting possession or obstructing delivery, but the *bona fide* setting up of a title against the decree-holder. Even if, therefore, the case in part fell under rules 97, 98 and 103 of order XXI of the Civil Procedure Code, the main dispute between the parties really came within the scope of section 47; the case, therefore, also fell under section 47 and as the order amounted to a decree it was appealable.

The order exempting the defendant and at the same time allowing his name to remain in the decree was tantamount to a dismissal of the suit as against him; and by the explanation appended to section 47 he must be deemed to be a party to the suit for the purposes of that section, though of course he was not a judgment-debtor. Section 47 is not necessarily confined to disputes between decree-holders on the one side and judgment-debtors on the other.

Even if there were any inconsistency between the provisions of the rules in order XXI and the provisions of section 47, the section would override the provisions of the rules, by virtue of section 128(1).

Mr. *Vishwa Mitra*, for the appellant.

Mr. *Baleshwari Prasad*, for the respondents.

SULAIMAN, C.J., and MUKERJI, J.:—This is an appeal by defendant No. 4, arising out of an execution proceeding. A suit for partition was brought by the plaintiff against several defendants in respect of two houses originally. The appellant, Said Ahmad, was defendant No. 4. He pleaded that he was entitled to one house by virtue of his adverse possession. The plaintiff withdrew his claim as regards the other house, with liberty to bring a suit afresh. As regards the second house, it was claimed by Said Ahmad that the plaintiff instead of fighting the case against him, chose to exempt him from the suit. The court ordered that defendant No. 4 be exempted from the suit, and he be given his costs. There was, however, no order that his name should be struck off the array of parties and

should no longer appear in the decree. His name continued to be on the record as one of the parties, and appeared in the decree which was subsequently passed, though it was noted that he had been exempted.

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In the execution department the plaintiff sought delivery of possession of the very house which the defendant No. 4 had been claiming. The attempt was resisted by Said Ahmad, who pleaded that he was the owner of the property. The execution court in a summary proceeding held that Said Ahmad had failed to prove his title, and also went on to hold that he had been set up by the judgment-debtors. His objection was accordingly dismissed, and possession was ordered to be delivered to the decree-holder.

Said Ahmad preferred an appeal to the District Judge, who dismissed the appeal on the ground that the proceedings were under order XXI, rule 97 and rule 98, and that no appeal lay to him. The order of the District Judge has been upheld by a learned Judge of this Court.

The learned Judge of this Court has held that the proceedings fell under order XXI, rules 97 and 98, and also fell under section 47 of the Civil Procedure Code. He has rightly pointed out that the defendant No. 4 was a party to the suit for the purposes of the execution proceedings, but he cannot be considered to be a judgment-debtor. He has, however, held that section 47 contains a general provision of the law, whereas order XXI, rule 98 contains special provisions applicable to this particular case. In his opinion, the special provisions must prevail over the general provisions. He has accordingly upheld the order of the lower appellate court and dismissed the appeal.

It is true that a defendant who has been exempted from the suit, and against whom no decree is passed or an order capable of execution made, is not a judgment-debtor as defined in section 2 (10) of the Civil

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Procedure Code. At the same time it cannot be doubted that in view of the explanation added to section 47, for the purposes of that section a defendant against whom a suit has been dismissed must be deemed to be a party to the suit. The order exempting him and at the same time allowing his name to remain in the decree was tantamount to a dismissal of the suit as against him. It follows that the defendant must be deemed to be a party for the purposes of the execution proceedings; he must therefore be deemed to be a party for all purposes under that section. Sections 2 and 47 have to be read together, and where there has been a formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties in regard to any matter or controversy in the suit, the order amounts to a decree and all such orders which include the determination of any question under section 47 are decrees. Section 47 is not necessarily confined to decree-holders on the one side, and judgment-debtors on the other, and is wide enough to cover a dispute between co-defendants who may be parties in a partition suit. There is no doubt that the defendant was a party to the suit for the purposes of the execution department, and was entitled to put forward his title to the property which was sought to be seized by the decree-holder. Indeed, if he were not to do so, his remedy by a separate suit would be barred.

The learned advocate for the respondent has urged before us that inasmuch as the case fell under order XXI, rules 97 and 98, the only remedy open to the defendant was one by way of separate suit under rule 103, and the appeal was barred under that rule. Order XXI, rules 97 and 98 contemplate cases where the judgment-debtor or some one whom he has set up is resisting or causing obstruction to the delivery of possession to the decree-holder. The court has to see *prima facie* whether there is any just cause for such

resistance and obstruction, and has not to investigate the question of title thoroughly. In the present case it was not merely a matter of resisting possession or obstructing delivery, but the setting up of a title as against the decree-holder. Even if, therefore, it be conceded that the case in part fell under rules 97 and 98 and 103, the main dispute between the parties really came within the scope of section 47 of the Civil Procedure Code.

There is, in our opinion, no inconsistency between the provisions of the rules in order XXI and the provisions of section 47. But even if there were, it is obvious that section 47 must override the provisions of the rules in the schedule, as is suggested by section 128 (1) of the Civil Procedure Code. Where a case falls both under section 47 and under some rule in order XXI, there will be no prohibition against a second appeal, because the prohibition under section 104(1) is confined to orders only and not decrees. If the order comes under section 47 also, the order would be a decree and an appeal would lie under section 96 of the Civil Procedure Code and a second appeal under section 100 to this Court.

Order XXI, rule 103 merely lays down that where an order is passed against a person under rules 98, 99, or 101 the order is conclusive, subject to the result of the separate suit. It does not say that where the order falls under some other section as well, the order would still be conclusive and no appeal would lie therefrom. The order being under section 47, read with section 2 of the Civil Procedure Code, an appeal lay to the District Judge, who has wrongly rejected the appeal.

The appeal is accordingly allowed, the decree of this Court and of the lower appellate court set aside and the case is sent back to the lower appellate court with directions to re-admit the appeal to its original number on the file and dispose of it according to law. Costs will abide the result.

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