

1934

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SINGH

We accordingly allow this appeal, set aside the judgment and decree of the lower appellate court and as the lower appellate court has not decided the other points raised in the memorandum of appeal filed before it, we remand this case to that court for decision of the other question raised in appeal before that Court. The plaintiff appellant will in any case get his costs of this appeal. Other costs will abide the result.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

1934
October, 31.

MANZOORUDDIN (DECREE-HOLDER-APPELLANT) *v.* RAM LAL
(JUDGMENT-DEBTOR-RESPONDENT)*

Execution of decree—Conflicting descriptions of subject-matter of decree—Executing Court to ascertain as to which description the decree was intended to apply.

Where there is a conflict between two descriptions of the subject-matter of a decree the duty of the Court executing the decree is to ascertain by a reference to the record or other evidence to which description the decree was intended to apply. *Ganga Prasad v. Subhag Chand* (1), followed.

Dr. *Qutub Uddin* for Mr. *Hyder Husain*, for the appellant.

Mr. *Ram Bharose Lal*, for the respondent.

SRIVASTAVA, J.:—This is an appeal by the decree-holder against the order, dated the 4th of February, 1933, of the Additional Subordinate Judge of Bara Banki affirming the order, dated the 24th of October, 1932, of the Munsif of Fatehpur, district Bara Banki.

The circumstances which have given rise to this appeal are briefly these. The decree-holder, who was plaintiff in the original suit sued the defendant judg-

*Execution of Decree Appeal No. 24 of 1933, against the order of S. Qadir Hasan, Additional Subordinate Judge of Bara Banki, dated the 4th of February, 1933, upholding the order of S. Yaqub Ali Rizvi, Munsif of Fatehpur at Bara Banki, dated the 24th of October, 1932.

(1) (1914) 17 O.C., 256.

ment-debtor for specific performance of a contract for sale. It was alleged in the plaint that the defendant had entered into an agreement with the plaintiff to sell a shop numbered 2224 and 2247 corresponding to present nos. 3707 and 3708 covering an area of 5 biswansis situate in mohalla Rasulpur in qasba Nawabganj in which Munnu, son of Parwani Ahir, was carrying on his shop for sale of milk and sweets. In the course of trial the parties referred the decision of the suit to an arbitrator, who made an award, under which in the contingencies which have happened, the plaintiff has become entitled to possession over the shop in dispute and to get a sale deed executed in his favour by the defendant. This award was followed by a decree passed in terms of it. When the plaintiff made an application to get a sale deed executed by the defendant, the latter filed an objection alleging that the area of the land covered by the shop in dispute was only 3 biswansis odd and not 5 biswansis. The Munsif appointed a Commissioner who went to the spot and prepared a plan which shows that an area of 3 biswansis and $1\frac{1}{2}$ kachhwansis only out of nos. 3707 and 3708 is covered by the shop occupied by Munnu, son of Parwani and that the rest of the area of no. 3707 is included in the house-belonging of the defendant which is in the occupation of one Murli as a tenant. The learned Munsif himself visited the spot and was satisfied that the plan prepared by the Commissioner and the report made by him in accordance with it were correct. In the result the learned Munsif upheld the objection of the defendant judgment-debtor and held that the decree-holder was entitled to get a sale deed only in respect of the area covered by the shop which was in the occupation of Munnu. This view has been upheld by the learned Subordinate Judge.

It has been contended before me that both the lower courts have gone wrong in entering into an inquiry of

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the question as regards the area covered by the shop of Munnu. It has further been argued that the lower courts as courts of execution could not modify the arbitrator's award or go behind the decree passed in pursuance of it. On these grounds it is urged that the courts below were bound to get the defendant to execute a sale deed in respect of the entire 5 biswansis area of nos. 3707 and 3708.

In my opinion the appeal has no substance and must fail. There is no question of the Court going behind the decree or the award. As a matter of fact the award or the operative part of the decree does not contain any description of the shop which has been referred to only as the shop in dispute. It is therefore necessary to look to the description given in the plaint. The findings of the two lower courts show that the language used in the plaint applies partly to one set of existing facts and partly to another existing set of facts, but the whole of it does not apply correctly to either. If one is to be guided by the description of the area of 5 biswansis, the result would be that the shop in suit would include part of the defendant's house, which is tenanted by Murli. If on the other hand the description about the shop in suit being occupied by Munnu is to be adopted as a guide then the decree must be confined to an area of 3 biswansis and $12\frac{1}{2}$ kachhwansis. It was held by a Bench of the late Court of the Judicial Commissioner of Oudh in *Ganga Prasad and another v. Subhag Chand* (1), that in such a case of conflict between two descriptions of the subject-matter of the decree the duty of the Court executing the decree is to ascertain by a reference to the record or other evidence to which description the decree was intended to apply. I have no hesitation in agreeing with the courts below that the description about the shop in suit being in the occupation of Munnu is one

(1) (1914) 17 O.C., 256.

which is least likely to have been inserted inadvertently or by mistake and must therefore be accepted as a more reliable guide for identifying the subject-matter of the dispute. I am therefore of opinion that the decision of the lower court is correct.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava

KING-EMPEROR (COMPLAINANT-APPELLANT) *v.* CHANDRA-BHAL AND ANOTHER (ACCUSED-RESPONDENTS)*

1934
October, 26

United Provinces Excise Act (IV of 1910), section 71—Excisable articles found in a house—Presumption of guilt against occupant of house, whether always justified.

In order to raise the presumption of guilt against an accused under section 71 of the Excise Act (U. P.), it must be made out that he was in possession of the excisable article. A person in the occupation of a house cannot be presumed to be in possession of everything found inside the house. Whether such a presumption should be raised in any particular case or not must depend upon the facts and circumstances of each case. *Abdul Rahman v. Emperor* (1), *King-Emperor v. Ismail* (2), and *King-Emperor v. Kashi Nath* (3), distinguished. *Bashir Ahmad Khan v. King-Emperor* (4), *King-Emperor v. Farrukh Husain* (5), and *Bahadur Dube v. King-Emperor* (6), relied on.

Where some excisable articles were found in a heap of *bhusa* stacked in a room in a house in which a guest was sleeping while the tenant of the house was sleeping in another room it cannot be said that the tenant of the house was in possession of the excisable articles and the presumption under section 71 of the United Provinces Excise Act cannot be raised against him.

*Criminal Appeal No. 132 of 1934, against the order of S. M. Zakir, Excise Magistrate, 1st class of Lucknow, dated the 6th of March, 1934.

(1) (1928) 26 A.L.J., 414.

(2) (1929) 27 A.L.J., 609.

(3) (1930) 28 A.L.J., 249.

(4) (256) 22 O.C., 256.

(5) (1920) 24 O.C., 294.

(6) (1925) 12 O.L.J., 388.