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MRS.

CAROLINE

GRACE

FOSTER

v.

MR. ALFRED

BERTRAM

FOSTER

Nanavutty, J.

It now only remains for me to consider the question of costs.

It has been held in *Bernstein v. Bernstein* (1), that the co-respondent would be entitled to costs if the adultery of the wife is proved to have been connived at by the petitioning husband. It seems to me, however, looking to all the circumstances of the case and the social status and the financial conditions of all parties concerned in the present litigation that the most equitable order as to costs in these two suits would be to direct that each party should bear its own costs; and I order accordingly.

The result is that Mr. Foster's petition is dismissed and Mrs. Foster's petition for divorce is granted. Parties will bear their own costs throughout.

REVISIONAL CIVIL

Before Sir C. M. King Kt., Chief Judge, and Mr. Justice
E. M. Nanavutty

1936

April 23

MOHAMMAD SALAMATULLAH (DECREE-HOLDER-APPLICANT)
v. LALA MURLI DHAR (AUCTION-PURCHASER-OPPOSITE
PARTY)*

Civil Procedure Code (Act V of 1908), order XXI, rule 71 and section 47—Decree-holder-auction-purchaser's failure to deposit purchase money—Re-sale—Deficiency in sale-price—Decree-holder entitled to rateable distribution, if entitled to apply for recovery of deficiency of price from decree-holder-auction-purchaser—Application held not maintainable—Appeal against order rejecting application, if lies.

Held, that the expression "decree-holder" in order XXI, rule 71 means the decree-holder who brings the property to sale and not all the decree-holders who are entitled to share rateably under section 73, Civil Procedure Code. Where, therefore, a decree-holder brings the property to sale and purchases it himself but on his failure to deposit the purchase money the

*Section 115 Application No. 75 of 1936, against the order of Pandit Krishna Nand Pandey, Additional Subordinate Judge of Unao, dated the 22nd of December, 1933, confirming the order of M. Eqbal Husain, Munsif of Safipur at Unao, dated the 22nd of August, 1933.

(1) (1893) L.R., P.D., 292.

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property is resold, another decree-holder who was entitled to rateable distribution has no right to apply under order XXI, rule 71, Civil Procedure Code, for the deficiency in price resulting from the resale to be realised from the decree-holder-auction-purchaser. *Prayaga Doss Jee Varu v. Thimma Nayanim Bahadur Varu* (1), and *Matungini Dassi v. Manmotha Nath Bose* (2), relied on. *Lakshmi v. Kullunni* (3), *Ajudhia Prasad v. Nand Lal Singh* (4), *Chattrapat Singh v. Jadukul Prosad Mukerjee* (5), *Bejoy Singh Dudhuria v. Hukum Chand* (6), and *Mohan Lal v. Mirza Humayun Jah* (7), referred to.

No appeal lies against an order in disputes between rival decree-holders seeking to attach the same property or claiming against each other in the distribution of the assets or disputes between joint decree-holders *inter se* as they are not within the purview of section 47 of the Code of Civil Procedure. Where, therefore, a decree-holder-auction-purchaser fails to deposit purchase money and a resale is effected, and an application by rival decree-holder for the deficiency of price resulting from the resale by reason of the decree-holder-auction-purchaser's default being realised from the latter is rejected as being not maintainable, the order rejecting the application is not appealable, the appeal being not one against an order against which an appeal is provided for by order XLIII, rule 1, Civil Procedure Code.

Mr. H. H. Zaidi, for the opposite party.

KING, C.J. and NANAVUTTY, J.:—This is a second appeal against an appellate order of the learned Additional Subordinate Judge of Unao upholding the order of the learned Munsif of Safipur at Unao dismissing the application of the appellant with costs under order XX, rule 1 of the Code of Civil Procedure.

At the hearing of the appeal a preliminary objection was raised by the learned counsel for the respondent that no appeal lies as disputes between rival decree-holders seeking to attach the same property or claiming against each other in the distribution of the assets or disputes between joint decree-holders *inter se* are not within the purview of section 47 of the Code of Civil Procedure (see Mulla's Code of Civil Procedure, 10th edition, page 172). This moreover is not an appeal

(1) (1926) I.L.R., 49 Mad., 570.

(2) (1900) 4 C.W.N., 542.

(3) (1887) I.L.R., 10 Mad., 57.

(4) (1894) I.L.R., 15 All., 319.

(5) (1893) I.L.R., 20 Cal., 673.

(6) (1902) I.L.R., 29 Cal., 548.

(7) (1910) 13 O.C., 291.

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against an order against which an appeal is provided for by order XLIII, rule 1 of the Code of Civil Procedure. The appellant, who is present in person, has argued the appeal himself. He has admitted the force of the contention raised by the learned counsel for the respondent in his preliminary objection and has verbally requested us to treat this memorandum of appeal as an application for revision under section 115 of the Code of Civil Procedure. We uphold the preliminary objection but grant the verbal request of the appellant Salamatullah to treat his memorandum of appeal as an application for revision under section 115 of the Code of Civil Procedure.

King, C.J.
and Nana-
vally, J.

The facts out of which this present application for revision arises are briefly as follows:

One Lala Murli Dhar obtained a decree against Nasratullah. On the 12th of December, 1929, the decree was transferred to the Deputy Commissioner of Unao for necessary action. The applicant Salamatullah in execution of his decree against Nasratullah obtained an order for rateable distribution in respect of money realised by Murli Dhar in his application for execution of his decree. On the 30th of June, 1932, the property of the judgment-debtor was auctioned and Murli Dhar made the highest bid and his bid was accepted, but on the 15th of July, 1932, Murli Dhar failed to deposit the amount in cash within time and so the first sale was cancelled and the property was ordered to be resold on the 30th of November, 1932. In this way there occurred a deficiency of Rs.4,689-15-6 and on the 26th of May, 1933, the applicant Salamatullah filed an application under order XXI, rule 71 of the Code of Civil Procedure praying that the deficiency of price resulting from the resale by reason of the auction-purchaser's default may be realised from him. A preliminary objection was raised on behalf of Lala Murli Dhar on the 19th of August, 1933, that the applicant was not

entitled under order XXI, rule 71 of the Code of Civil Procedure to recover the deficiency. The learned Munsif of Safipur by his order, dated the 22nd of August, 1933, upheld the preliminary objection and decided that the application of Salamatullah was not maintainable and accordingly dismissed it with costs. In appeal the learned Additional Subordinate Judge of Unao by his order, dated the 22nd of December, 1933, confirmed the order of the learned Munsif and dismissed the appeal with costs. The applicant Salamatullah has now come up to this Court challenging the correctness of the decisions of the lower courts.

The main contention urged by the appellant on his behalf is that the words "the decree-holder or the judgment-debtor" occurring in rule 71 of order XXI of the Code of Civil Procedure entitle any decree-holder of the judgment-debtor, besides the decree-holder who has put up the property of the judgment-debtor to sale, to recover the deficiency of price resulting on a resale by reason of the purchaser's default. In support of his contention the applicant Salamatullah has cited a number of cases reported in *Lakshmi v. Kullunni* (1), *Ajudhia Prasad and another v. Nand Lal Singh and others* (2), *Chattrapat Singh v. Jadukul Prosad Mukerjee and others* (3), *Bejoy Singh Dudhuria v. Hukum Chand* (4) and *Lala Mohan Lal v. Prince Mirza Humayun Jah* (5). We have examined the rulings cited to us by the applicant and we are of opinion that they do not touch the question of law involved in the present case. The facts of the present case are fully covered by a Bench decision of the Madras High Court in *Shree Mahant Prayaga Doss Jee Varu v. Umade Raja Rajai Raja Damara Kumara Thimma Nayanim Bahadur Varu and others* (6). The contention advanced before us in the present case was also advanced in that case. Mr. Justice

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(1) (1887) I.L.R., 10 Mad., 57.

(2) (1894) I.L.R., 15 All., 319.

(3) (1893) I.L.R., 20 Cal., 673.

(4) (1902) I.L.R., 29 Cal., 548.

(5) (1910) 13 O.C., 291.

(6) (1926) I.L.R., 49 Mad., 570.

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DEVADOSS repelled the contention in the following words:

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King, C.J.
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“The contention of Mr. T. V. Venkatarama Ayyar for the appellants is that the expression ‘decree-holder’ in order XXI, rule 71 should be held to mean all the decree-holders who are entitled to share rateably under section 73, Civil Procedure Code. His argument is that under the old Code the expression ‘decree-holder’ was held to include all decree-holders entitled to share rateably under section 73. He relies upon *Bejoy Singh Dudharia v. Hukumchand* (1), and *Chakrapani Chetty v. Dhanji Settu* (2). Such a construction would no doubt be a beneficial one so far as the decree-holders are concerned. But reading order XXI, rule 71, it cannot be said that the legislature intended by the expression ‘the decree-holder’ any decree-holder or all the decree-holders against the judgment-debtor. It cannot be that each decree-holder who was entitled to share rateably has the right to proceed under rule 71. From the juxtaposition of the expression ‘at the instance of either the decree-holder or the judgment-debtor’, it is clear that the legislature intended by the term ‘the decree-holder’ the decree-holder who brings the property to sale, for, the right to proceed against the defaulting purchaser for the deficiency is given to the judgment-debtor as well as to the decree-holder. If it was intended that any other decree-holder should have the benefit, the legislature would have made the matter clear by adding an explanation as in section 64 or by using the expression ‘at the instance of any decree-holder’ instead of the expression ‘the decree-holder’.”

We are in entire agreement with the views of the learned Judges of the Madras High Court on this point. The same view was taken by the Calcutta High Court in a ruling reported in *Matungini Dassi v. Manmotha Nath Bose and others* (3), in which it was held by RAMPINI, J. and WILKINS, J. that the terms “the decree-holder” in section 311 of the old Code of Civil Procedure corresponding to the present rule 90 of order XXI of the Code of Civil Procedure meant the decree-holder who brought the property to sale and not any

(1) (1902) I.L.R., 29 Cal., 548.

(2) (1901) I.L.R., 24 Mad., 311.

(3) (1900) 4 C.W.N., 542.

decree-holder. We therefore consider that the decisions of the lower courts are perfectly correct.

We accordingly dismiss the miscellaneous appeal of Salamattullah, which we have treated as an application for revision under section 115 of the Code of Civil Procedure, with costs.

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Application dismissed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge,
and Mr. Justice Ziaul Hasan*

DUBRI MISIR, PANDIT (PLAINTIFF-APPELLANT) v. THE
DISTRICT BOARD, FYZABAD (DEFENDANT-
RESPONDENT)*

1936
October, 8

District Boards Act (U. P. Act X of 1922), section 90(4)—Financial Handbook, Vol. II, chapter XIII, rule 128—Fundamental Rules, chapter VIII, rule 54—Suspension of a District Board employee—Prosecution in criminal court—Acquittal for want of proper proof—Employee, if entitled to salary for period of suspension—Suspended officer reinstated for purpose of accepting his resignation—District Boards Act, section 54, if applies.

Employees of District Boards are governed by chapters I to IX of the Fundamental Rules.

Where an employee of a District Board, who has been suspended by the Board and against whom complaints were made in the criminal court, is acquitted merely because the facts proved did not bring him within the letter of the law, he cannot be said to have been "honourably acquitted" and is therefore not entitled to his salary for the period of his suspension under rule 54, chapter VIII of the Fundamental Rules.

The words "ultimately restored" in section 90(4) of the District Boards Act are not intended to apply to a case in which a suspended person is restored for the purpose of his resignation being accepted. Such an employee is, therefore, not entitled to payment of full salary for the period of his suspension.

*Second Civil Appeal No. 372 of 1934, against the decree of Mr. G. C. Badhwar, I.C.S., District Judge of Fyzabad, dated the 11th of September, 1934, confirming the decree of M. Ziauddin Ahmad, Subordinate Judge of Fyzabad, dated the 17th of February, 1934.