

APPELLATE CIVIL

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

NIHAL CHAND (PLAINTIFF-APPELLANT) *v.* KHUSHAL

CHAND AND OTHERS (DEFENDANTS-RESPONDENTS)*

1937
April, 22

Civil Procedure Code (Act V of 1908), order XXI, rules 100 and 103—Decree against member of joint Hindu family—Attachment and sale of joint family house—Application by manager of joint family on behalf of joint family under order XXI, rule 100, Civil Procedure Code, dismissed—Subsequent suit by a member of joint family for possession of his share by partition, maintainability of.

Where the holder of a money decree against a member of a joint Hindu family attaches and puts to sale a house belonging to the joint family and purchases it himself and obtains possession and an application made under order XXI, 100 Civil Procedure Code, by the manager of the joint family on behalf of the joint family, alleging that he had been dispossessed of the house by the decree-holder-auction-purchaser and claiming to be restored to possession is dismissed and no suit is brought within limitation to establish the right of the joint family to the possession of the property, then under order XXI, rule 103, the order dismissing the application becomes conclusive with the result that the joint family loses the right to possession of the house. Thereafter a suit by a member of the joint family seeking to recover possession of his share in the house by means of partition is barred. When the right of the family as a whole to recover possession of the house becomes barred by reason of the provisions of order XXI, rule 103 it follows that the right of every individual member constituting the joint family for possession of such share as he might be entitled to on partition must be equally barred. The consideration whether the cause of action is one and the same or is different has no material bearing on the question.

Mr. *Sri Ram*, for the appellant.

Mr. *P. N. Asthana*, for the respondents.

SRIVASTAVA, C. J. and ZIAUL HASAN, J.:—This is a second appeal by the plaintiff against the decree of the

*Second Civil Appeal No. 322 of 1935, against the decree of Pandit Brij Kishan Topa, Civil Judge of Malihabad at Lucknow, dated the 16th of May, 1935, upholding the decree of S. Abbas Raza, Munsif, North Lucknow, dated the 9th of November, 1934.

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learned Civil Judge of Malihabad, Lucknow, affirming the decree of the learned Munsif, North Lucknow. The facts of the case are that defendants 2 and 3 in execution of a money decree held by them against defendant 1 attached and put to sale a house in mohalla Chikmandi in the city of Lucknow and purchased it themselves. It is admitted that defendant No. 1 was a member of a joint Hindu family consisting of himself, defendant 4, defendant 5 and the plaintiff. It is further admitted that defendant 4 was the managing member of the joint family. Before the house was put to sale an objection was filed by defendant No. 4 under order XXI, rule 58 of the Code of Civil Procedure. Subsequently defendant 4 made an application saying that he did not want to prosecute his objection and that it might be dismissed. The court thereupon ordered that the objection be consigned to the records. Thereafter defendant 4 and the plaintiff both instituted a suit for declaration of their title to the house. This suit was dismissed for want of prosecution under order IX, rule 8 of the Code of Civil Procedure. After the sale had taken place and the auction purchasers had obtained possession of the house an application was made by defendant 4 under order XXI, rule 100 of the Code of Civil Procedure. This application was dismissed on the ground that it was barred by time. Thereafter the plaintiff instituted the present suit for a decree for possession by partition of a one-third share in the aforesaid house. Both the courts below have agreed in dismissing the suit on the ground that it was barred by order XXI, rule 63 of the Code of Civil Procedure, order XXI, rule 103 and by the rule of *res judicata*. They also held the suit to be barred by limitation under Article 11(a) of the Limitation Act. If the view of the courts below on any of these points is correct it would be enough to put the plaintiff out of court.

The application made by defendant 4 under order XXI, rule 100 clearly alleged that he had been dispossessed of the house by the decree-holders auction-purchasers and claimed to be restored to possession. We

have already said that defendant 4 is admittedly the manager of the joint Hindu family. The application made by him under rule 100 also shows that he made it on behalf of the family. This application was dismissed and no suit was brought within limitation to establish the right of the joint family to the possession of the property. Order XXI, rule 103 clearly shows that in the circumstances the order dismissing the application has become conclusive. The result of this is that the joint family has lost the right to possession of the house. The plaintiff who is a member of the joint family seeks in the present suit to recover possession of his share in the house by means of partition. When the right of the family as a whole to recover possession of the house has become barred by reason of the provisions of order XXI rule 103 it follows that the right of every individual member constituting the joint family for possession of such share as he might be entitled to on partition must be equally barred. It has been argued that the cause of action for a suit for partition is different from the cause of action for a suit for possession. In our opinion the consideration whether the cause of action is one and the same or is different has no material bearing on the question. Order XXI, rule 103, in the events which have happened, makes the order dismissing the application of defendant 4 conclusive so far as the rights of the joint family are concerned. The object of the present suit is merely to nullify that order so far as the plaintiff's one-third share in the house is concerned. This the plaintiff cannot be allowed to do. He cannot be permitted to accomplish in the garb of the present suit for partition what the joint family is debarred from accomplishing as a result of the provisions of order XXI, rule 103. The appeal must therefore fail on this point. In the circumstances it is not necessary for us to discuss the other points on which the suit has been dismissed by the courts below.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

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