

that is to say, decides the question which of the parties was in possession at the date of the order made under sub-section 1, it is not necessary to see whether or not any of the parties has been dispossessed within two months next before the date of the order. As in the present case the learned Sub-Divisional Magistrate had decided on the evidence before him that the complainants were in possession, no question arises as to who was in possession two months before the passing of the preliminary order.

There is in my opinion no ground for interference with the order of the Sub-Divisional Magistrate and I therefore reject the reference.

Reference rejected.

MISCELLANEOUS CIVIL

*Before Mr. Justice G. H. Thomas, Chief Judge and
Mr. Justice R. L. Yorke*

RANI SURAJ KUER AND OTHERS (APPLICANTS) v. RAJA DEO
SINGH AND OTHERS (OPPOSITE PARTY)*

1938

September,
28

*Civil Procedure Code (Act V of 1908), order XLV, rule 15—
Execution of decree of His Majesty in Council—Prayer for
preparation of memo. of costs, whether includes prayer for
transmission of order to court concerned—Direction for
execution, if to be added to transmission order.*

Where in an application for execution of an order of His Majesty in Council the prayer simply is that the memo. of costs be directed to be prepared, *held*, that this prayer includes also the prayer for transmission of the order to the court concerned. The usual procedure adopted by the Chief Court is that when such an application is made, it is sent to the office for necessary action and the office then prepares the memo. of costs and transmits it to the court concerned without any further direction or orders of the Court.

In transmitting an order of His Majesty in Council for execution under order XLV, rule 15(2), it is not necessary to give any directions for the execution of the decree particularly when they were not asked for.

*Civil Miscellaneous Application No. 529 of 1938 in P. C. A. No. 4 of 1934.

1938
SYED
MOHAMMAD
NASIR
v.
DWARKA
SINGH

Ziaul
Hasan, J.

1938

RANI
SURAJ
KUMARv.
RAJA DEO
SINGH

Messrs. *Radha Krishna Srivastava, Sri Ram, Bishun Singh* and *S. N. Srivastava*, for the applicant.

Messrs. *M. H. Qidwai* and *Karta Krishna*, for the opposite party.

THOMAS, C. J. and YORKE, J.:—This is an application under order XLV, rule 15 of the Code of Civil Procedure on behalf of Dr. B. N. Varma praying as follows :

“That having regard to the terms of the sale deed dated 3rd October, 1933, and the Order in Council attached herewith this Hon'ble Court be pleased to direct the office to prepare the estimate of costs awarded by Their Lordships of the Privy Council in terms of Indian money and transmit it to the court which passed the decree with the direction that the petitioner would be entitled to execute the decree for costs of all the three courts against the legal representatives of Thakur Gaya Bakhsh Singh and Raja Birendra Bikram Singh.”

It appears that on the 16th of February, 1931, Kunwar Deo Singh under the guardianship of his mother, Musammat Raj Rani Kuar, filed a suit for declaration in respect of certain properties in the districts of Hardoi, Lucknow and Unao against Thakur Gaya Bakhsh Singh and others on the original side of this Court. The suit was decreed in favour of Kunwar Deo Singh in respect of properties held to be taluqdari properties. He was awarded costs amounting to Rs.3,585-1-0. Thakur Gaya Bakhsh Singh then appealed to this Court, and during the pendency of the said appeal, in order to meet the expenses for prosecution of the appeal and some other connected appeals pending in this Court and also to raise funds for the prosecution of the appeal before Their Lordships of the Privy Council, Musammat Raj Rani Kuar as guardian of Kunwar Deo Singh transferred a 3 annas 3 pies share in the estates under a sale-deed, dated 3rd October, 1933, in favour of Dr. B. N. Varma. The other purpose stated in the sale deed is to provide the minor and his mother with maintenance of Rs.100 per

mensem till they obtain possession of the estates or till the date when the judgment of the Court in favour of Kunwar Deo Singh becomes final. The applicant's name was added in the array of respondents as respondent No. 4 by an order of a Bench of this Court, dated 11th December, 1933.

It is stated on behalf of the applicant that the costs of the appellate court amounts to Rs.4,032-2, and the costs before their Lordships of the Privy Council, Rs.8,187-1-6. Mr. Mubashir Husain admits that the applicant paid fees to the counsel in the appellate court and also sent some money to the Solicitors in London.

The applicant has filed the original order of their Lordships of the Privy Council with this application which shows that the costs of the appeal has been awarded to respondent No. 1 and not to the applicant. Kunwar Deo Singh has filed a duplicate copy of the order of their Lordships of the Privy Council signed by the Clerk of the Council.

The learned counsel on behalf of the applicant relies on one of the clauses of the sale-deed in which it is stated that in the event of success he will be entitled to realise and spend all the costs awarded to respondent No. 1 (Kunwar Deo Singh). It is further contended that the sale-deed has been accepted by a Bench of this Court in its order, dated 22nd January, 1934. There is a good deal of force in this argument. The contention on behalf of Kunwar Deo Singh is—

- (1) that the application is belated,
- (2) that the application is not maintainable, and
- (3) that the sale-deed is invalid.

The application filed by Kunwar Deo Singh is, dated 16th July, 1938, in which it was prayed that a memorandum of costs be directed to be prepared and the following order was passed by one of us—"To office for necessary action". This is the usual order which is passed on such applications. The memo. of costs was

1938

RANI
SURAJ
KUER
v.
RAJA DEO
SINGH

*Thomas,
C. J. and
Yorke, J.*

1938

RANI
SURAJ
KUER
v.RAJA DEO
SINGH

prepared and signed by the Deputy Registrar on the 26th of July, 1938, while the present application with the application for stay of preparation of memo. of costs till the disposal of the application, was made on the 2nd of August, 1938. The following order was passed on the application for stay :

"Let notice go. The preparation of memo. of costs and further proceedings in pursuance of the application made by respondent No. 1 will be stayed till the decision of the application presented today."

*Thomas,
C. J. and
Yorke, J.*

The following endorsement "Copy with the following papers be placed on the file of Original Suit No. 2 of 1931 for information and necessary action" was made on the 30th of July, 1938, on the back of the application made by Kunwar Deo Singh, dated 16th July, 1938. The papers were transmitted on the original side on the 6th of August, 1938.

The contention of the learned counsel on behalf of the applicant is that the application on behalf of Kunwar Deo Singh simply prays that the memo. of costs be prepared, and that there is no prayer that it should be transmitted. We do not agree with this contention. In our opinion this prayer includes also the prayer for transmission of the order to the court concerned. The usual procedure adopted by this Court is that when such an application is made, it is sent to the office for necessary action. The office then prepares the memo. of costs and transmits it to the court concerned without any further direction or orders of the court.

It was next pointed out that under order XLV, rule 15, clause (2), the court should have given certain directions for the execution of the decree. In our opinion it was not necessary to give any further directions and particularly when they were not asked for.

It was contended by the learned counsel on behalf of Kunwar Deo Singh that the act of the court is only a ministerial act. It is not necessary to discuss this point. We are of opinion that the application is belated and the applicant's remedy now is to raise the points which are

raised before us either in the court which decided the suit or the executing court.

In this view of the case, it is not necessary for us to decide the other points which have been raised by the learned counsel on behalf of Kunwar Deo Singh.

We accordingly reject the application but make no order as to costs.

Application rejected.

1938

RANI
SURAJ
KUMAR
v.
RAJA DEO
SINGH

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

BANKEY LAL AND ANOTHER (DEFENDANTS-APPELLANTS) v.
VIDYA SAGAR ABKAR (PLAINTIFF-RESPONDENT)*

1938

September,
29

Right of transfer of house by Riyaya—Riyaya occupying houses in cities and towns, right of transfer of—Landlord suing transferee of house of riyaya—Burden of proof—Zemindar building house subsequently losing proprietary rights in village—Right of transfer of house, if lost.

In the case of *riyayas* occupying houses in cities and towns it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas. Where, therefore, a landlord sues the transferee of a house of a *riyaya* in a town, he must prove that the site of the house belongs to him and that the transferor was incompetent to transfer the house. *Kanhaiya Lal v. Hamid Ali* (1), *Muhammad Ali Khan v. Badrunnissa* (2), and *Muhammad Sher Khan v. Amjad Husain* (3), referred to.

A house built or bought by a zamindar is a transferable house and such rights of transfer do not cease on an auction sale of his undivided zamindari share in the village. *Zahur Hasan v. Shaker Banoo* (4), followed. *Kanhaiya Lal v. Sheva Lal* (5), dissented from.

Mr. *Nasir Ullah Beg*, for the appellants.

Mr. *Radha Krishna Srivastava*, for the respondent.

*Second Civil Appeal No. 168 of 1936, against the decree of Mr. Kishan Lal Kaul, Civil Judge of Fyzabad, dated the 26th of February, 1936, reversing the decree of Mr. Shiam Manohar Tewari, Munsif of Fyzabad, dated the 14th of September, 1935.

(1) (1930) 7 O.W.N., 2271.

(2) (1928) A.I.R., Oudh, 438.

(3) (1929) 13 R.D., 615.

(4) (1925) A.I.R., All., 29.

(5) (1935) A.L.J.R., 1118.