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the petition also to show that they have expressed their consent in any manner that the suit should be withdrawn. I have therefore no hesitation in agreeing with my learned brother that the suit in the present case was not withdrawn; but that does not preclude the present plaintiff from instituting a suit for partition inasmuch as the cause of action in a suit for partition is a recurring one and a joint owner at any time has a right to come to court provided he proves that he has a subsisting joint title and possession in the property within the period of limitation. Ram Dei, therefore, had a right to institute the suit for partition if she was able to prove that she had a joint title in the property and that she was in possession with the defendants or their predecessors-in-interest within the period of limitation; in other words she is entitled to bring a suit if her title to the property, if any, is not lost by adverse possession in favour of the opposite party.

[The remainder of the judgment is not material to this report.]

LETTERS PATENT.

Before Jwala Prasad and Ross, JJ.

CHOWDHURY RAM PRASAD RAI

v.

MAHESH KANT CHOWDHURY. *

1921
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 December, 16.

Execution of Decree—application for withdrawal by decree-holder, whether court may refuse—appeal from order refusing withdrawal, maintainability of—Second appeal from order reversing first court's order—power of High Court to exercise revisional power—Code of Civil Procedure, 1908 (Act V of 1908), section 115, Order XXI, rule 1, and Order XXIII, rule 4.

There is nothing in the Code of Civil Procedure, 1908, to prevent a decree-holder who has taken out execution of his decree from withdrawing the execution and having it dismissed.

Where the decree-holder's application to withdraw the execution was disallowed by the Munsif, and, on appeal, the Munsif's order was set aside by the District Judge, *held*, that the orders of the Munsif and of the District Judge were made without jurisdiction and that the High Court was competent in an appeal from the order of the District Judge to set aside both orders under section 115.

* Letter Patent Appeal No. 62 of 1921.

Andrew Anthony v. Rev. J. M. Dupont (1), *Zamiran v. Fateh Ali* (2) and *Debi Das v. Ejaz Husain* (3), followed.

The facts of the case material to this report were as follows:—

The plaintiff, having obtained a decree, caused the property of the judgment-debtor to be advertised for sale, and the 17th April, 1919, was fixed for the sale. On that day the decree-holder applied to the Munsif to dismiss the execution case.

The application was rejected and the property was put up for sale and sold. The decree-holder appealed to the District Judge from the decision of the Munsif and the order of the Munsif and the sale were set aside. The auction-purchaser appealed to the High Court and the appeal was heard by a single Judge who held that no appeal lay from the order of the Munsif. His Lordship set aside the order of the District Judge and restored that of the Munsif.

The decree-holder appealed under the Letters Patent.

Lachmi Kant Jha, for the appellant.

Saroshi Charan Mitter, for the respondent.

JWALA PRASAD, J.—This is a Letters Patent Appeal against a decision of a single Judge of this court. By his order the learned Judge decreed the appeal presented to this court.

The respondent obtained a decree against certain persons and in execution of that decree he caused the property of the appellant, judgment-debtor, to be advertised for sale. On the 17th of April, 1919, the date fixed for sale, he applied to the court to dismiss this execution case. This application was rejected by the Munsif with the result that the property was put up for sale and was purchased by the appellant. The decree-holder being dissatisfied with the decision of the Munsif preferred an appeal to the court of the District Judge of Darbhanga. The District Judge being of the opinion that the court had no power to sell the property on

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(1) (1882) 1. L. R. 4 Mad. 217. (2) (1905) 1. L. R. 32 Cal. 146.

(3) (1906) 1. L. R. 28 All. 72.

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its own account, in disregard of the application of the decree-holder, set aside the order of the Munsif and also the sale held in pursuance thereof. The purchaser therefore appealed to this court. The appeal was heard by Mr. Justice Das. He held that the District Judge had no jurisdiction to deal with the matter in appeal and to set aside the order of the Munsiff. He accordingly set aside the order of the District Judge and restored that of the Munsif.

The learned Judge of this court was perfectly right in holding that no appeal lay from the order of the Munsif rejecting the application of the decree-holder and ordering the sale of the property in question. I, however, think that the learned Judge should have gone further and should have set aside the order of the Munsif in exercise of the powers vested in this court under section 115 of the Code of Civil Procedure. The Munsif's order was certainly without jurisdiction and not sanctioned by any provisions of the Civil Procedure Code. Execution was taken by the decree-holder and the powers of the court with respect to that execution were invoked by the decree-holder. The application was made under Order XXI, rule 1, and the nature of the relief and the mode for the enforcement of that relief were expressly stated by the decree-holder, *vide* rules 10 and 11 of Order XXI. The decree-holder expressly prayed for the execution of the decree and for the sale of the property of the judgment-debtor. He had the right to withdraw the execution petition at any moment he liked. No doubt Order XXIII, which relates to the withdrawal and abandonment of a claim, does not apply to the execution proceedings; but there is nothing to prevent a decree-holder from withdrawing his execution and getting it dismissed if he does not want to claim any relief in respect of the execution. The party which sets the law court in motion has a right to withdraw the proceedings from the court. Therefore, the order of the Munsif was wrong and he acted certainly without jurisdiction in persisting in selling the property in spite of the wishes of the decree-holder to the contrary.

Now two broad orders were passed in this case, *first*, by the Munsif and, *second*, by the lower appellate court. None of these courts had any jurisdiction to pass their respective orders. This, therefore, was a fit case to set right the wrong order of the Munsif. Section 115 of the Code of Civil Procedure empowers the court to act *suo moto* or on an application of the aggrieved person, nor is there any limit of time prescribed for it. In fact the decree-holder need not have come to this court if he had obtained an order of the District Judge, however wrong and without jurisdiction. Therefore, this court having been apprised of an order without jurisdiction passed by the Munsif should have set aside that order under section 115 of the Code. Authorities are not wanting where in such cases the High Court exercised their revisional jurisdiction under section 115 of the Code [*Andrew Anthony v. Rev. J. M. Dupont* (1), *Zamiran v. Fateh Ali* (2), and *Debi Das v. Ejaz Husain* (3).]

I therefore decree this appeal and set aside the order of the learned Judge as well as that of the Munsif and consequently the sale in execution is set aside. In the circumstances I make no order as to costs.

Ross, J.—I agree.

Order set aside.

APPELLATE CIVIL.

Before Dawson Miller, C. J., and Coutts, J.

MUSSAMMAT JANAKBATI CHAUDHRAIN.

MAHARAJADHIRAJ RAMESHWAR SINGH BAHADUR *

Code of Civil Procedure, 1908 (Act V of 1908) Order XXI, rules 72, 86, 92, and section 151—Execution sale—permission granted to decree-holder to bid upon conditions—conditions not fulfilled, whether decree-holder auction purchasers entitled to set off decretal amount against purchase money—power of court to refuse to confirm the sale.

* Appeal from original Order No 232 of 1920, from an order of B. Akhauri Nityananda Singh, Subordinate Judge of Darbhanga, dated the 6th July, 1920.

(1) (1882) I. L. R. 4 Mad. 217.

(2) (1905) I. L. R. 32 Cal. 146.

(3) (1906) I. L. R. 28 All. 72.

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