

APPELLATE CIVIL

Before Das and Adami, JJ.

SOVANI JENA.

v.

BHIMA RAY *

1921

December, 1.

Code of Civil Procedure, 1908 (Act V of 1903), section 47—Execution of decree—property purchased by decree-holder—subsequent suit by decree-holder against same defendant and another, for declaration of title to the land, whether maintainable.

Where, in a previous suit against defendant No. 1, the plaintiff had obtained a decree for possession, and he subsequently instituted the present suit for a declaration of his title to the same land, alleging that after he had obtained possession of the land in execution of his final decree he had been dispossessed by the defendants, and the lower courts found that he had not obtained actual possession under the first decree, *held*, that the present suit was barred by section 47 of the Code of Civil Procedure, 1908.

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

Sovani Jena instituted a suit against Bhima Ray for a declaration of title in respect so six plots of lands and for possession. He succeeded with respect to three plots and the suit was dismissed with regard to the remainder. In execution of that decree he obtained symbolical possession from the court, of the lands which had been awarded to him by the decree. The defendant No. 2 occupied a house on one of the plots. He was not a party to the original suit.

In the present suit against Bhima Roy and defendant No. 2 the plaintiff prayed for a declaration of his title to the land and the house. There was a further prayer for removal of the house.

The plaintiff alleged that in execution of his decree he had obtained possession of the land and

* Circuit Court, Cuttack. Appeal from Appellate Decree No. 22 of 1921 from a decree of D. H. Kingsford, Esq., District Judge of Cuttack, dated the 4th May, 1921, reversing a decision of Babu Bijoy Krishna Fakar, Munsif of Cuttack, dated the 30th April, 1920.

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house but that he was subsequently dispossessed by Bhima Roy and defendant No. 2. The defendant No. 1 pleaded that as against him the suit was barred by section 47 of the Code of Civil Procedure, 1908. Defendant No. 2 pleaded that as against him the suit was barred by Order II, rule 2(1). The trial court awarded plaintiff possession of the land and directed the house to be removed as plaintiff had not proved his title to it.

The defendants appealed to the District Judge who reversed the decree of the trial court.

The plaintiff appealed to the High Court.

Subodh Chandra Chatterjee, for the appellants.

Durga Prasanna Das Gupta, for the respondents.

DAS. J.—We must affirm the decree passed by the court below. The plaintiff obtained a decree against the defendant 1. His allegation is that in execution of that decree he recovered possession of the property but that he was subsequently dispossessed by defendants 1 and 2. On that allegation he instituted a suit for declaration of title and for recovery of possession. His allegation that he recovered possession but was subsequently dispossessed is disbelieved. The learned Judge in the court below has come to the conclusion that so far as the defendant No. 1 is concerned the plaintiff's suit is barred by the provisions of section 47 of the Code and so far as the defendant No. 2 is concerned he must fail because he has not proved his title against him. Now the learned Vakil who appears on behalf of the appellant urges before us that section 47 is not applicable to his suit. I am of opinion that it is. His remedy was to proceed under the Code and if he was obstructed at all either by defendant No. 1 or defendant No. 2 he should have applied under Order XXI, rule 97, of the Code for investigation of the matter. The court would then have fixed a day for investigating the matter and would have summoned the party against whom the application was made for him to appear and answer the same. Then the court would have

passed an order either under rule 99 or rule 100 of Order XXI, and that would have given a right to the plaintiff to sue the party successfully obstructing him. So far as the defendant No. 2 is concerned the learned Judge in the Court below has recorded a finding that the plaintiff has not established his title as against him.

This appeal must be dismissed with costs.

ADAMI, J.—I agree.

Appeal dismissed.

REVISIONAL CIVIL

Before Das and Adami, J.J.

BISWANATH PATRA

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Sovani Jena

vs.

Bhima Rai.

Das, J.

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LINGARAJ PATRA.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 58, 63 and 100—usufructuary mortgagee in possession, objection to attachment by, at instance of judgment creditor of mortgagor—objection dismissed—property sold under the decree and mortgagee dispossessed—whether mortgagee entitled to apply under rule 100.

A person in possession of property under an usufructuary mortgage is not entitled to object, under Order XXI, rule 58, of the Code of Civil Procedure, 1908, to the attachment of the property at the instance of a person who holds a decree against the mortgagor, and, therefore, when such an objection has been made and disallowed rule 63 does not debar the objector from making an application under rule 100.

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

The petitioner was in possession of certain property under an usufructuary mortgage executed by opposite party No. 3. Opposite parties Nos. 1 and 2 obtained a money decree against the latter and attached

* Circuit Court, Cuttack. Civil Revision No. 8 of 1921 from an order of Balm Lakshmi Narain Patnaik, Munsif of Puri dated the 19th February, 1921.