

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

PANCHO BANIA

v.

ANAND THAKUR.*

1923.

April, 27.

Execution of Decree—appeal successful as regards some judgment-debtors—second appeal by plaintiff—Limitation—terminus a quo

Plaintiff obtained a decree against several defendants. On appeal the lower appellate court dismissed the suit as against three of the defendants. From that decision the plaintiff appealed to the High Court. *Held*, that limitation for execution of the decree as against the defendants bound by the decree of the court of first instance did not begin to run until the High Court had disposed of the plaintiff's appeal.

In such a case the Court should see whether the original decree was really one decree or an incorporation of several decrees and whether or not the appeal against it impelled the whole decree for the execution of which the application is made.

Christiana Sens Law v. Benarshi Prashad Chowdhury(1) and *Lokenath Singh v. Guju Singh*(2), followed.

Where the plaintiff in a suit has obtained a decree against several defendants and on appeal the suit as against some of the defendants is dismissed, the High Court, in a second appeal by the plaintiff, is entitled to dismiss the suit as against the remaining defendants.

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

Plaintiff sued several defendants for possession and mesne profits. On the 27th September, 1917, the suit was dismissed as against two defendants and

* Appeal from Appellate Order No. 241 of 1922, from an Order of Ashutosh Chatterji, Esq., District Judge of Darbhanga, dated the 24th June, 1922, affirming an order of Babu Narendra Nath Banarji, Munsif of Darbhanga, dated the 18th March, 1922.

(1) (1914-15) 19 Cal. W. N. 287.

(2) (1915-16) 20 Cal. W. N. 178.

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decreed as against the others. The decree did not state whether different portions of the lands covered by the decree were in the possession of different defendants. The plaintiff appealed against that part of the decree which dismissed the suit as against two of the defendants, and the appeal was dismissed. Three of the other defendants, *viz.*, Nos. 3, 7 and 15 also appealed. They alleged that there could have been no decree as against them. This appeal was decreed and as against defendants 3, 7 and 15 the suit was dismissed. The plaintiff appealed to the High Court against the appellate decree impleading only defendants 3, 7 and 15. Plaintiff's appeal was dismissed. More than three years after the 27th September 1917, but within three years from the High Court decree the plaintiff made the present application for execution of the original decree. The defendants contended that execution of the decree was barred by limitation. This objection was overruled by the first Court. An appeal by the defendants was unsuccessful. They therefore preferred the present appeal to the High Court.

Muhammad Hasan Jan, for the appellants.

P. C. Ray, for the respondents.

DAS, J.—This appeal must be dismissed. It is contended that the order appealed from could not possibly have affected the decree sought to be executed because, as the judgment of the Lower Appellate Court shows, the defendants 3, 7 and 15 claimed definite shares in the subject-matter of the dispute. We have been referred to the decree passed by the Lower Appellate Court in support of the argument that defendants 3, 7 and 15 claimed definite identifiable land. The decree of the Lower Appellate Court, however, does not irresistibly lead to that conclusion; but, in my opinion, the appellant must fail even if it be assumed that the defendants claimed definite identifiable lands out of the lands in suit. The plaintiff appealed against the decree of the Lower Appellate

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Court by which the Lower Appellate Court had dismissed the plaintiff's suit as against the defendants 3, 7 and 15. No doubt the plaintiff appealed only against that portion of the judgment of the Lower Appellate Court by which it had dismissed the suit as against the defendants 3, 7 and 15; but in appealing against the decision of the Lower Appellate Court the plaintiff put it in the power of the High Court to say that the whole suit of the plaintiff should be dismissed. It is contended by the learned Vakil that the High Court had no such power under Order XLI, rule 33. The question is not whether the High Court would have exercised the power; the question is whether there was a possibility of the High Court in the appeal of the plaintiff dismissing the plaintiff's entire suit. In my opinion the case of the plaintiff being that all the defendants were joint *tort feasons* and had jointly taken possession of the plaintiff's land, it was open to the High Court, under the provision of Order XLI, rule 33, to dismiss the plaintiff's entire suit if it came to the conclusion that his appeal, as against the defendants 3, 7 and 15, could not succeed. I do not say that the High Court would, in the particular case, or in fact in any case, take that course; but the possibility was always there, and, in my opinion, the plaintiff was entitled to wait till the appeal was disposed of in the High Court before proceeding with his execution as against those defendants against whom his suit had succeeded in the Court of first instance. As it was laid down in *Christiana Sens Law v. Proshad Chowdhury* (1), the Court should see whether the original decree was really one decree or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not for the execution of which the application is made. In my opinion the appeal presented by the plaintiff to this Court against the decree of the Lower Appellate Court imperilled his whole decree. That being so, according to the

(1) (1914-15) 19 Cal. W. N. 287.

decisions of the Calcutta High Court in *Christiana Sens Law v. Proshad Chowdhury* (1) and *Lokenath Singh v. Guja Singh* (2), time would begin to run from the date of the decree of the High Court.

The order of the Court below is right and this appeal must be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Mullick and Macpherson, J.J.

AULAD ALI

v.

ABDUL HAMID.*

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1923.

May, 1.

Mortgage Decree—Right of decree-holder to choose order of sale—mortgage of several items of property—equity of redemption in one item purchased by mortgagee—decree on the mortgage—liability of the other items—sale of the items purchased by the mortgagee, right of latter to apply to set aside—order setting aside sale, appeal from order reversing; whether second appeal lies from—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 89, and section 115.

The holder of a mortgage decree, in the absence of any direction in the decree to the contrary, and of any equities created against himself, is entitled to sell the mortgaged properties in whatever order he chooses.

But when one of the properties has been put up for sale and purchased *bona fide* by a third person the sale cannot be set aside merely on the ground that the executing court declined to put the properties up to sale in the order required by the decree-holder.

*Appeal from Appellate Order No. 156 of 1922, from an order of Rai Bahadur Jadunandar Prasad, District Judge of Purnea, dated the 16th March, 1922, confirming an order of Babu Harihar Prasad, Subordinate Judge of Purnea, dated the 11th December, 1920.

(1) (1914-15) 19 Cal. W. N. 287. (2) (1915-16) 20 Cal. W. N. 178.