

## REVISIONAL CIVIL.

Before *Jwala Prasad and Kulwant Sahay, J.J.*

RUN BAHADUR SINGH

v.

BAJRANGI PRASAD SINGH.\*

1924.

January, 3.

*Assignment of Decree—assignment to two persons independently—application for execution by each assignee—proceeding converted into suit—decree in favour of one of the assignees—application to revise decree, maintainability of—Code of Civil Procedure, 1908 (Act V of 1908), section 47, Order XXI, rule 16.*

Two applications for execution of a mortgage decree were made by two persons, each of whom claimed to be an assignee of the decree. The matter was treated as one under section 47, Civil Procedure Code, the judgment-debtor not objecting to this course. During the hearing the court converted the proceeding into a suit under sub-section (2) of section 47, and eventually decided the matter in favour of one of the parties and passed a decree in his favour. The other party applied to the High Court for revision of the order and contended that inasmuch as the question determined by the court did not arise between the parties to the suit in which the mortgage decree was passed but between persons claiming to be the representatives of the decree-holder only, the matter did not fall within the purview of section 47 and, therefore, the court had no power to convert the proceeding into a regular suit. It was further contended by the applicant that the decree passed by the lower court was an order under Order XXI, rule 16, and that as there was no right of appeal from that order the High Court was competent to exercise its revisional powers.

*Held (i) that if the lower court's order fell under Order XXI, rule 16, it was not revisible unless it was shown to have been made without jurisdiction; (ii) that if the lower court's order was passed under section 47(i) it was appealable, and therefore, not revisible; and (iii) that if the lower court's*

\*Civil Revision No. 355 of 1923, from an order of Rai Bahadur Surendra Nath Mukherjee, Subordinate Judge, Patna, dated the 25th June, 1923.

order was passed in a regular suit under section 47(2) it was a decree and the proper remedy was an appeal. Permission was given to the applicant to convert the application for revision into an appeal on condition that the applicant filed a copy of the decree and paid the proper court-fee.

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

On the 24th February, 1923, the petitioners filed an application for execution of a mortgage decree, dated the 8th December, 1915, said to have been assigned to them by means of a registered document, dated the 5th February, 1923, by one Basant Lal, the original decree-holder, opposite party No. 2. On the 26th February, 1923, the opposite party No. 1, Bajrangi Prasad, put in an application for execution of the same decree upon the ground that he was an assignee of the decree from the same decree-holder, Basant Lal. Both these applications for execution were put up for hearing on 10th March, 1923. The question, therefore, before the Court below was as to which of the executions should proceed. This involved a determination as to the validity of the deeds of assignment in favour of the rival claimants to execute the decree, namely, the petitioner's and opposite party No. 1. The matter was treated as one under section 47 of the Civil Procedure Code, namely, as to the right of the rival claimants to represent the original decree-holder and execute the decree. The judgment-debtors did not make any objection, and therefore the dispute was between the two rival claimants as representatives of the decree-holder. The case, however, was treated as one under section 47 of the Civil Procedure Code, and in the course of the hearing of the matter the Court thought that the question was one which should have been determined in a regular suit; and the learned Subordinate Judge converted the proceeding into a suit under clause (2) of section 47 of the Civil Procedure Code. Ultimately he held by his decision, dated the 25th June, 1923, that the deed of assignment in favour of opposite party No. 1, Bajrangi Prasad Singh, must

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prevail, and that the deeds of assignment set up by the petitioners were ante-dated and were suspicious. He, therefore, held that the opposite party No. 1 was entitled to proceed with the execution of the decree obtained by Basant Lal, opposite party No. 2. The present application was directed against the said order of the Subordinate Judge, and it was contended that his order was without jurisdiction and hence capable of being revised by the High Court under section 115 of the Civil Procedure Code.

*S. N. Bose*, for the petitioner.

*Bimola Charan Sinha*, for the opposite party.

JWALA PRASAD, J. (after stating the facts, as set out above, proceeded as follows):—

The order in question purports to have been passed in a suit into which the proceeding originally instituted was converted by the Subordinate Judge. A decree also has been prepared in accordance with the said order. The opposite party had, under the direction of the Court, to pay court-fee upon Rs. 7,000, the consideration money mentioned in his deed of assignment. Now, if the order of the Subordinate Judge is one passed in a regular suit and culminated in a decree regularly prepared and passed under the Code of Civil Procedure, then a first appeal would lie from that decree to this Court. If, on the other hand, the order is one passed under section 47 of the Civil Procedure Code, then also an appeal would lie to this Court.

It is, however, contended that the order in question was neither passed in a regular suit nor under section 47 of the Code, for the question determined by the Court did not arise in a dispute between the parties to the original suit but between the representatives of one of the parties to the suit, namely, the decree-holder.

It is then contended that as the dispute did not come under section 47 of the Code, the Court had no

jurisdiction to convert the application made by Bajrangji Prasad Singh into a suit, for it is said that under clause (2) the Court could only convert a proceeding under section 47 into a suit, but as the application was not a valid proceeding under the section the Court had no jurisdiction to treat the same as a plaint in a suit. The learned Vakil contends that the applications of the parties and the order of the Court below would come under Order XXI, rule 16, of the Code, under which the Court has to determine whether an assignee of the decree-holder should be permitted to proceed in execution. It is said that as the matter comes under that provision of the Code, there is no appeal, and, as there is no appeal, the present application is competent as an application in revision; but the learned Vakil has failed to show that the final order of the Court below directing Bajrangji Prasad Singh to proceed with the execution was not within the jurisdiction of the Court. Hence the order is not capable of revision. With this final order the learned Vakil has no grievance; but he impugns the procedure adopted by the Court below whereby the Subordinate Judge arrived at this conclusion. In short, his argument is that the Court below should not have tried the application of Bajrangji Prasad Singh as a suit, and should have simply determined the right of one of the rival claimants to execute the decree, leaving the matter to be fought out and determined in a regular suit instituted by Bajrangji Prasad Singh or by the petitioners. He considers the procedure adopted by the Court below to be a grave irregularity affecting the final order passed by the Court below. Now, by whatever method the Court has arrived at its decision, it cannot be said that the Subordinate Judge acted without jurisdiction. In trying the matter as a suit perhaps the Subordinate Judge went more exhaustively than he would have done had the matter been treated only as an application under section 47 of the Code. Therefore we cannot accept the contention of the learned Vakil that the final order of the Court below

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was without jurisdiction even if it came under Order XXI, rule 16, of the Code. We cannot interfere with this order in revision. If, on the other hand, the matter came under section 47 of the Code, the application in revision is incompetent. Again, if it did not come under section 47 but arose in the course of the trial of the application treated by the Court below as a suit, there is the final decree prepared by the Court below, and the question now raised cannot be determined except in a regular appeal filed against the decree. The present application, therefore, has to be rejected.

The learned Vakil, on behalf of the petitioners, then asks us to convert the application in revision filed in this Court into a memorandum of appeal against the decree passed by the Court below. This can be done upon the petitioners paying proper court-fee and filing a copy of the decree.

In the circumstances of the case we are prepared to treat the application as an appeal upon the condition mentioned above which must be complied with within a week of the determination of the amount of court-fee payable upon the memorandum of appeal. Upon the requisite court-fee being paid and copy of the decree filed, the appeal will be heard without the preparation of any paper-book, the appellants undertaking to supply typed copies of the papers necessary for determination of the appeal, which we do not think are many.

On the failure of the petitioners to comply with the conditions mentioned above, namely, the payment of the court-fee and filing of a copy of the decree, the present application will be treated as dismissed with costs.

KULWANT SAHAY, J.—I agree.