

Even if Biseswar Pratap Narayan can prove that he got possession in 1908 the subsequent entry of Mr. Stevens, the receiver appointed in 1908 by the Magistrate under section 146 of the Code of Criminal Procedure and of Mr. Moore, the receiver appointed by the Civil Court in 1911 put an end to the illegal possession of Biseswar Pratap Narayan and restored the possession of the true owner Chandreshwar Prasad Narayan. Biseswar Pratap Narayan could not be heard to say that he was in adverse possession against any one during the occupation of the successive receivers since 1908.

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It was useless therefore for the Subordinate Judge to attempt to safeguard any further the title of Biseswar Pratap Narayan.

Appeals dismissed.

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

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Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rule 90, prayers under, whether can be joined in one application—objection that the decree was a nullity, whether can be put forward in execution proceedings.

A prayer under section 47, Code of Civil Procedure, 1908, may, in certain circumstances, be joined with a prayer under Order XXI, rule 90, in one application.

In execution proceedings an objection to the validity of the decree may be taken on the ground that one of the judgment-debtors had died before the decree was passed.

* Appeal from Appellate Order no. 257 of 1926, from a decision of Radha Kanta Ghose, Esq., District Judge of Purnea, dated the 26th June, 1926, confirming a decision of Babu Basu Prasad, Munsif of Araria, dated the 6th June, 1925.

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Appeal by the judgment-debtors.

Hasan Jan, for the appellants.*D. L. Nandkeolyar*, for the respondents.

ADAMI, J.—A decree having been passed against the father of the appellants together with other judgment-debtors and the property of the appellants having been put up for sale in execution of the decree and sold to a third person, the appellants came forward with an application under section 47 and under Order XXI, rule 90, of the Code of Civil Procedure, seeking to have the sale set aside. The objections put forward to the sale were, first, that there had been irregularities in connection with the proclamation and the process leading to the sale, and, secondly, that the decree in execution of which the property was sold was in fact a nullity inasmuch as the father of the appellants had died before the decree in the suit was passed.

The Courts below have rejected the application of the appellants finding, in the first place, that there was no such irregularity as would warrant the setting aside the sale, and, secondly, that the two grounds put forward in the petition could not form the subject of one and the same application. The Courts below have held that a prayer under section 47 of the Code could not be joined in one application with a prayer under Order XXI, rule 90, and therefore they rejected the application to set aside the sale on the ground of the decree being a nullity.

It has been decided by a Bench of this Court that in execution proceedings the objection can be put forward that the decree was a nullity since one of the judgment-debtors had died before the decree was passed. Neither the Courts below nor the Advocate in this Court have put forward any decision to the effect that a prayer under section 47 cannot be joined with a prayer under Order XXI, rule 90, in one application, and there seems to be no good reason for disallowing the joinder of the two applications. The application of the appellants was to have the sale set

aside, and it would be unreasonable that, because there were two reasons for setting aside the sale, there must be two applications. It is only reasonable that the executing Court should deal with every objection which the judgment-debtors put forward in one and the same proceeding.

The result is that the appeal must be allowed, and the executing Court, having disposed of the objection under Order XXI, rule 90, should now enquire into the objection under section 47. Costs in the Courts below will follow the result.

MACPHERSON, J.—I agree. It is admitted that neither on principle nor on authority can the orders of the Courts below be supported. It may further be indicated that had it in fact been necessary for the objectors to make an election in the first Court, that Court ought to have put them to their election and not have itself chosen at a late stage which of the two objections it should consider and which it should not consider.

Appeal allowed.

APPELLATE CIVIL.

Before Adami and Macpherson, JJ.

BAJIF LAL PATHAK

v.

MAHARAJADHIRAJ SIR RAMESHWAR SINGH
BAHADUR.*

Code of Civil Procedure, 1908 (Act V of 1908), Order IX, rules 4 and 8 and Order XLIII, rule 1(c)—defendant appears but applies for time—suit dismissed for default—rule 4, whether applicable—application to set aside dismissal, dismissed for default—appeal whether lies—Order XLIII, rule 1(c).

Where, on the date fixed for hearing, the plaintiff does not appear and the defendant appears but applies for time, and the Court dismisses the suit for default, the order falls

* Appeal from Original Order no. 66 of 1927, from an order of Babu Shivanandan Prasad, Subordinate Judge of Purnea, dated the 26th March, 1927.

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