

## APPELLATE CIVIL.

*Before Wort and James, JJ.*

JADAB CHANDRA PODDAR

v.

RAMESHWAR MARWARI\*

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May, 7.

*Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rule 95—decree-holder auction-purchaser applying for possession—proceeding, whether relates to the "execution, discharge or satisfaction of the decree"—application rejected—regular suit—section 47, whether a bar.*

Where a decree-holder, who is himself the auction-purchaser at a court sale held in execution of his decree, seeks to get possession of the property so purchased under Order XXI, rule 95, Civil Procedure Code, 1908, he does not do so in execution of his decree, but by virtue of title acquired as purchaser, and his claim based on such title does not relate to the "execution, discharge or satisfaction of the decree", and the provisions of section 47, therefore, do not bar a separate suit for possession.

*Haji Abdul Ghani v. Raja Ram*(1), *Sridhar Sirdar v. Jageshwar Singh Mahapatra*(2), *Bhagwati v. Banwari Lal*(3) and *Hargovind Fulchand v. Bhudar Raoji*(4), followed.

*Kailash Chandra Tarafdar v. Gopal Chandra Poddar*(5) not followed.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Wort, J.

*A. B. Mukharji* and *U. N. Banerji*, for the appellant.

*A. K. Roy*, for the respondent.

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\* Appeal from Appellate Decree no. 1263 of 1926, from a decision of Babu Narendra Lal Bose, Subordinate Judge of Manbhum, dated the 25th of May, 1926, confirming a decision of Babu Nilkantha Bagchi, Munsif of Purulia, dated the 10th of February, 1925.

(1) (1916) 1 Pat. L. J. 232 F. B.

(2) (1919) 4 Pat. L. J. 716.

(3) (1909) I. L. R. 31 All. 82 F. B.

(4) (1924) I. L. R. 48 Bom. 550.

(5) (1925-26) 30 Cal. W. N. 649.

WORT, J.—This is an appeal in a case in which the plaintiffs claimed a declaration of title to and possession of a certain property in the following circumstances. In the first place I might state that the plaintiffs succeeded in their suit in the trial Court and in the lower appellate Court. The defendant in the suit was a defendant in a suit in which there was a money decree obtained against him; and on the 21st of February, 1916, the plaintiffs purchased in execution of that decree a residential house which was the property of the defendant. The purchase-price was Rs. 150. On the 9th of January, 1917, a compromise was entered into by which the defendant undertook to pay the sum of Rs. 200 forthwith and a further sum of Rs. 315 on the 30th of May in discharge of the decree under which the house was purchased by the plaintiffs. There was failure on the part of the defendant to perform the terms of this compromise; and on the 2nd of January, 1918, a further execution was taken out by the plaintiffs which was further compromised on the 20th of December, 1918, the terms of the compromise being that if the balance of the sum then due plus the Rs. 150 credited against the decree-holder for the house purchased by him, be paid to him by Chaitra, he would give up all claim to the house; and in case the payment was not made according to the agreement, the decree-holder would realize Rs. 150 by execution and also take delivery of possession of the house through Court. It is not necessary to state in detail what happened subsequent to this compromise except to say that the terms of the compromise were not complied with by the judgment-debtor. An application was, therefore, made by the plaintiffs on the 2nd of February, 1924, for delivery of possession under Order XXI, rule 95, Code of Civil Procedure. In the meantime, I should have stated, the sum of Rs. 180 had been recovered by the plaintiffs against the defendant's surety. The application to which I have made reference, that is to say, the application

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under Order XXI, rule 95, was rejected by reason of its being time-barred; and the plaintiffs instituted this suit.

Two points are raised in this appeal, the first being that the suit is not maintainable; and the second, that if it is maintainable then the defendant is entitled to a relief against what he alleges is a forfeiture and should have been allowed to pay up the balance of the amount due under the compromise, and, therefore, relieved from giving up possession of his residential house. Now on the first point, the substance of the argument actually amounts to this that owing to the state of the authorities on the point of law which arises, this case should be referred to a Full Bench of this Court for a final decision of this matter.

The argument which was raised by the learned Advocate for the appellant is this, that the suit is not maintainable for the reason that the application to which the plaintiffs are entitled is one under section 47 of the Civil Procedure Code relating to execution, discharge or satisfaction of the decree and, therefore, the plaintiffs should have adopted that procedure and it was not open to them to bring the suit which is now before us. The cases which the learned Government Pleader has brought to our notice will be dealt with now. The first case *Haji Abdul Ghani v. Raja Ram*<sup>(1)</sup> is a Full Bench decision of this Court in which it was decided that the application in circumstances similar to the present is not an application under section 47 of the Code and, therefore, there was no appeal against the application in the circumstances of the case. In the course of his judgment the then Chief Justice Sir Edward Chamier reviewed a large number of authorities and it was pointed out that there was a great conflict of decision. He came to the conclusion on the balance of the

(1) (1916) 1 Pat. L. J. 232, F. B.

authorities that the cases of the Calcutta High Court should be followed and that the matter did not come under section 47 of the Civil Procedure Code. Now the first point which the learned Government Pleader makes is that the decision of the learned Chief Justice was subsequently reviewed in the case of *Kailash Chandra Tarafdar v. Gopal Chandra Poddar*(1). In the first instance that was a decision of Cuming, J., which was referred to a Full Bench and the Full Bench came to the conclusion that where a decree-holder as an auction-purchaser applies for the possession of a property, as in this case, under Order XXI, rule 95, he comes under section 47 of the Civil Procedure Code as it is a question arising, "between the parties" and it is a proceeding relating to the "execution, discharge or satisfaction of the decree". The argument which was addressed to us or the suggestion which was made before us is that having regard to that decision which impliedly, if not expressly, overruled the decisions of the Calcutta High Court upon which this Court relied in the case of *Haji Abdul Ghani v. Raja Ram*(2), this case should be sent to a Full Bench for final disposal. Now so far as this Court is concerned, there is another case—*Sridhar Sirdar v. Jugeshwar Singh Mahapatra* (3). In that case the Chief Justice and Jwala Prasad, J., reviewed the authorities which were quoted in the case of *Haji Abdul Ghani v. Raja Ram*(2), to which I have already referred, and came to a conclusion, following the decision of the Full Bench of this Court in *Haji Abdul Ghani v. Raja Ram*(2), which may be expressed in the words of Jwala Prasad, J: "The long course of decision in the Calcutta High Court indicates that the balance of opinion in that Court has been strongly in favour of the view that the question relating to the delivery of possession does not relate to the execution, discharge or satisfaction of the decree and does not come under section 47 of the present Code

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(1) (1925-26) 80 Cal. W. N. 649.

(2) (1916) 1 Pat. L. J. 282, F. B.

(3) (1919) 4 Pat. L. J. 716.

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or section 318 of the old Code.” Not only are there those cases to which I have made reference, but there are cases to the same effect in the other High Courts, the first of which is the case of *Bhagwati v. Banwari Lal*(1). This is a decision of the Full Bench of the Allahabad High Court which held (the Chief Justice dissenting) to the same effect as the cases to which I have already made reference. There is another authority in *Hargovind Fulchand v. Bhudar Raoji*(2) which is to the effect that where a decree-holder, who is himself the auction-purchaser at a Court sale held in execution of his decree, seeks to get possession of the property so purchased, he does not do so in execution of his decree but by virtue of the title acquired as purchaser; and his claim based on such title does not relate to the execution, discharge or satisfaction of the decree, and the provisions of section 47 of the Civil Procedure Code, therefore, do not prevent his filing a separate suit for possession. In my judgment, in view of these authorities it seems to me that this Court is bound not only by the authority of the other High Courts, but by the Full Bench decisions of this Court—*Haji Abdul Ghani v. Raja Ram*(3) and *Sridhar Sirdar v. Jageshwar Singh*(4) and it seems to me idle in these circumstances to refer the case to a Full Bench of this Court. The first point, therefore, which is raised in this appeal, that is to say, whether this suit is maintainable, is answered in the affirmative.

The next question is whether the defendant in the circumstances is entitled to equitable relief. The lower Courts have dealt with this matter as if it were a penalty. In my opinion the expression ‘penalty’ in connection with a case of this kind is irrelevant. The real point that does come up before us is not whether the defendant is entitled to

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(1) (1909) I. L. R. 31 All. 32, F.B.

(2) (1924) I. L. R. 48 Bom. 550.

(3) 1916) 1 Pat. L. J. 232, F.B.

(4) (1919) 4 Pat. L. J. 716, F. B.

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relief against a penalty but to relief against a forfeiture. It is said by the learned Government Pleader that the Court has jurisdiction in circumstances of this kind to relieve the defendant against the forfeiture which arises by reason of his non-payment of that part of the compromise which remains unsatisfied. Now, in the first instance there is no suggestion either in the written statement or in the evidence nor is there any finding by the Courts below that the defendant is ready and willing to discharge his obligation under the compromise: in fact if there be any finding at all, it is to the contrary. That in my judgment is sufficient to deprive the defendant of the relief which he now seeks. The point, if it be a question of law, is whether this Court or the Courts below had jurisdiction to grant the defendant the relief. In my opinion (and I wish to say nothing further with regard to the matter having regard to what I have already said on this point) the doctrine of granting equitable relief in the case of a forfeiture does not apply to a case of this kind. If the Court had jurisdiction in the case of a payment under a compromise, it would seem to me to be a jurisdiction under section 148 of the Civil Procedure Code which provides:

"Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

That section in my judgment does not apply for the simple reason that the section expressly states that

"the period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code".

Now the payment of these sums was not an act prescribed or allowed by the Code. That to my mind seems to be the short answer to that point.

In my judgment both on the facts and law the defendant is not entitled to the relief which he sought

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and, therefore, the decision of the lower Court is right and the appeal must be dismissed with costs.

JAMES, J.—I agree.

*Appeal dismissed.*

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*Before Wort and James, JJ.*

SRIRAM PANDE MINOR

v.

HARICHARAN PANDE\*

*Hindu Law—Mitakshara School—partition between sons and step-grand-son—step-grand-mother whether entitled to a share equal to the other parties.*

On a partition between the sons and a step-grand-son governed by the Mitakshara school of Hindu Law, the step-grand-mother is entitled to share equally with them.

*Har Narain v. Bishambhar Nath*(1) and *Purna Chandra v. Sarojini*(2), followed.

*Srimati Hemangini Dasi v. Kedarnath Kudu Chowdhry*(3) and *Sheo Narain v. Janki Parshad*(4), distinguished.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Wort, J.

*S. C. Mazumdar*, for the appellant.

*Susil Madhab Mullick* and *Bajrang Sahay*, for the respondent.

\* Appeal from Appellate Decree no. 1446 of 1926, from a decision of Babu Narendra Lal Bose, Subordinate Judge of Manbhum, dated the 21st May, 1926, reversing a decision of Babu Ram Prasad Ghosal, Munsif at Purulia, dated the 6th June, 1925.

(1) (1916) I. L. R. 88 All. 88.

(2) (1904) I. L. R. 31 Cal. 1085.

(3) (1888-89) 18 I. A. 115.

(4) (1912) 9 All. L. J. 749.