

## APPELLATE CIVIL.

*Before Mr. Justice Broadway and Mr. Justice Abdul Roof.*

BRIJ LAL (PLAINTIFF) *Appellant,*

*versus*

DURGA AND OTHERS (DEFENDANTS) *Respondents.*

Civil Appeal No. 1140 of 1915.

*Civil Procedure Code, Act XIV of 1882, section 244—sale of a judgment debtor's share in joint Hindu family property in execution of decree—decree-holder being the purchaser—subsequent suit by latter for partition—whether competent.*

ONE *G. R.* obtained a money decree against one *L.* He applied for attachment and sale of *L.*'s share in certain property which belonged to a joint Hindu family of which *L.* was a member. This share was ascertained to be one-sixth of the property, and was sold and purchased by *G. R.* himself. The sale was duly confirmed and the sale certificate issued. *G. R.* then applied for possession by partition of the share, the other members of the family objected, and the executing Court, on 22nd November 1902, ordered that *G. R.* should sue for partition in a separate suit, as partition could not be effected in execution proceedings. In 1913 the son of *G. R.* brought the present suit for partition. The lower Courts held that a separate suit was barred by section 47 of the Code of Civil Procedure, 1908.

*Held*, that section 244 of the old Code of Civil Procedure, which was applicable, did not give the executing Court power to effect a partition, and that the present suit was therefore necessary and competent.

*Yelumalai Chetti v. Srinivasa Chetti* (1), and *Bhagwati v. Banwari Lal* (2), followed.

*Bhaga Shah v. Bura Shah* (3), distinguished.

*Sheo Narain v. Nur Mukhammad* (4), not followed, being overruled by *Bhagwati v. Banwari Lal* (2).

*Second appeal from the decree of J. A. Ross, Esquire, Senior Subordinate Judge, Ferozepore, dated the 9th February 1915, affirming that of Lala Nand Lal, Munsif, 2nd class, Zira, District Ferozepore, dated the 17th December 1913, dismissing the suit.*

SOHAN LAL, for Appellant.

SHAMIR CHAND, for Respondents.

(1) (1906) I. L. R. 29 Mad. 294.

(2) (1908) I. L. R. 31 All. 82 F. B.

(3) 58 P. R. 1888.

(4) (1907) I. L. R. 30 All. 72.

The judgment of the Court was delivered by—

BROADWAY, J.—The facts of this case are as follows:—

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One Ganpat Rai obtained a money decree for Rs. 939 inclusive of costs on the 10th August 1899 against one Lajpat. On the 25th August 1899 an application was made asking for the attachment and sale of Lajpat's share in certain property which belonged to a joint Hindu family of which Lajpat was a member. The other members of the family objected to the attachment in that form contending that Lajpat's share should first of all be ascertained. This was done and the share was found to be  $\frac{1}{4}$ th of the property sought to be attached. Accordingly this  $\frac{1}{4}$ th share was sold on the 4th June 1901 and purchased by Ganpat. The sale was duly confirmed and the necessary sale certificate issued. Ganpat then applied for possession by partition of the share purchased by him to which request the other members of the family objected on the ground that no possession could be given until the property had been partitioned. On the 22nd November 1902 an order was made by the Court concerned directing that the purchaser should sue for partition in a separate suit as partition could not be effected in execution proceedings. Nothing further was done until the 10th June 1913 when the present suit was instituted by the son of Ganpat. This suit was dismissed on a preliminary objection, the Court holding that a separate suit was barred by the provisions of section 47, Civil Procedure Code. The learned District Judge on appeal upheld this decision and the plaintiff-appellant has thereupon come up to this Court.

The Courts below have relied on *Bhaga Shah v. Bura Shah* (1) and *Sheo Narain v. Nur Muhammad* (2). *Bhaga Shah v. Bura Shah* (1) however, is not really in point as the sale had never been confirmed, while *Sheo Narain v. Nur Muhammad* (2) was overruled by a Full Bench of the same Court in a decision reported as *Bhagwati v. Banwari Lal* (3). On the other hand the present case is similar to

(1) 58 P. R. 1888.

(2) (1907) I. L. R. 30 All. 72.

(3) (1908) I. L. R. 31 All. 62 F. B.

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that reported as *Yelumalai Chetti v. Srinivasa Chetti* (1) where it was held that the only right acquired by the Court sale was a right to effectuate the sale by a suit for partition of the joint property of the co-parceners and the delivery to the plaintiffs of what might be allotted to the share of the judgment-debtor. It was further held that the executing court was not competent, on a mere application for execution by the purchaser, to enforce the right of the purchaser by an order for partition. That case dealt with a purchaser at the sale other than the decree-holder and to that extent might be considered distinguishable from the present one. In *Bhagwati v. Banwari Lal* (2) it was held, however, that the mere fact that the purchaser was also a decree-holder made no difference. It seems to us that these two decisions are correct. Before the decree could be given effect to and possession made over, it was obviously necessary that a partition should first be effected. Whether or not section 47, Civil Procedure Code, would empower the Executing Court to effect partition, it is perfectly clear that section 244 of the old Code did not give an executing Court such powers. We accordingly follow the two decisions referred to above and hold that the present suit is not barred.

We accept the appeal and setting aside the orders of the Courts below return the case to the Court of first instance for disposal in accordance with law. Stamp on this appeal will be refunded and other costs will follow the event.

*Appeal accepted.*

(1) (1908) I. L. R. 29 Mad. 294.

(2) (1908) I. L. R. 31 All. 82 F. B.