1932

BIBI VAID KAUR v. BALKISHAN DAS MEHRA.

BHIDE J.

of execution could not be raised in subsequent proceedings.

In my opinion, the trial Court's decision was correct. I accept the appeal and setting aside the order of the learned District Judge direct the execution to proceed according to law. The appellant will get her costs throughout.

*A. N. C.*

*Appeal accepted.*

## APPELLATE CIVIL.

*Before Addison and Agha Haidar JJ.*

1932

*Dec. 20.*

MUHAMMAD HABIT KHAN (PLAINTIFF) Appellant

*versus*

BADI-UL-ZAMAN KHAN (DEFENDANT) Respondent.

**Civil Appeal No. 590 of 1928.**

*Declaratory Suit—whether competent—where property attached by Magistrate and Receiver appointed*—custodia legis.

In view of acute differences between plaintiff and defendant the police took action under Section 145 of the Criminal Procedure Code, and the Magistrate, 1st Class, passed orders under Section 146 by which the property in dispute was attached, and a Receiver appointed in respect thereof. The Receiver was ordered to realise rents and profits of the property attached until the parties had got their rights settled by a competent Civil Court. The plaintiff thereupon brought the present suit for a declaration that he was the absolute owner of the property, and the defendant had no concern or connection therewith. His suit was dismissed by the lower Court on the ground that as the property was in possession of the defendant, plaintiff ought to have sued for possession.

1932

MUHAMMAD HABIT KHAN v. BADI-UL-ZAMAN KHAN.

*Held* (accepting the appeal) that the property, having been attached by the Magistrate and a Receiver appointed, was in *custodia legis*, and the Magistrate was in the position of a stake-holder, who holds the property for and on behalf of the person who ultimately establishes his title in the Civil Court, and under the circumstances the plaintiff's suit for a declaration was properly framed.

*Panna Lal Biswas* v. *Panchu Ruidas* (1), *Jagannath Gir* v. *Tirguna Nand* (2), and *Harkishen Das* v. *Mst. Sundro Bibi* (3), relied upon.

*First appeal from the decree of* Lala *Diwan Chand, Subordinate Judge, 1st Class, Lahore, dated the 25th November, 1927, dismissing the plaintiff's suit.*

AMAR NATH CHOPRA, and HARBHAJAN DAS, for Appellant.

JAGAN NATH AGGARWAL, JIWAN LAL KAPUR, HUKAM CHAND BHASIN, and SARVA MITR SIKRI, for Respondents.

AGHA HAIDAR J.—This appeal arises out of a suit for a declaration that certain property situate at Qila Gujar Singh, Lahore, belongs to the plaintiff and that the defendant has no right or interest in it. The plaintiff's suit having been dismissed by the trial Court, he has come up to this Court in appeal. AGHA HAIDAR J.

The plaintiff came into Court on the allegation that, under two sale deeds, he purchased the property in dispute, that disputes and differences arose between the parties who are related to each other as uncle and nephew, and that the plaintiff succeeded in obtaining mutation in his favour in the revenue papers. He further alleges that, in April 1925, differences between

(1) (1922) I. L. R. 49 Cal. 544. (2) (1915) I. L. R. 37 All. 185.
(3) 1926 A. I. R. (Oudh) 43.

1932

MUHAMMAD HABIT KHAN v. BADI-UL-ZAMAN KHAN.

AGHA HAIDAR J.

the parties became acute and the Police were obliged to take action under section 145 of the Criminal Procedure Code. On the 29th June, 1925, an order was passed by Mr. Disney, Magistrate, 1st Class, Lahore, under section 146 of the Criminal Procedure Code, by which he attached the property in suit and appointed one Mohammad Israel as Receiver, ordering him to realise rents and profits of the property attached until the parties had got their rights settled by a competent Civil Court. The plaintiff further alleged that he was not in actual possession of the property as it was under attachment, by the order of the Magistrate, dated the 29th June, 1925. On these allegations he prayed for the declaration that he was the absolute owner of the property in suit and the defendant had no concern or connection therewith.

The defendant raised the plea that the plaint was not properly framed, that the plaintiff ought to have sued for possession and that, as he had not done so, his suit should be thrown out on the ground of its being misconceived.

The learned Subordinate Judge, after framing issues and recording evidence, held that the property was in the possession of the defendant and that the plaintiff, therefore, ought to have brought a suit for possession and paid the proper court-fee. He gave time to the plaintiff to amend his plaint and pay the extra court-fee, but the plaintiff persisted in the attitude, which he had taken up while filing the plaint, and did not either amend the plaint or pay the additional court-fee. The result was that, on the 25th November, 1927, the learned Subordinate Judge dismissed with costs the plaintiff's claim.

1932

MUHAMMAD HABIT KHAN v. BADI-UL-ZAMAN KHAN.

AGHA HAIDAR J.

The contention on behalf of the plaintiff, in effect, is that, as the property had been attached by the Magistrate under his order, dated the 29th June, 1925, and a Receiver had been appointed under the provisions of section 146 (2) of the Criminal Procedure Code, it may be taken that it was *in custodia legis* and the Magistrate was in the position of a stakeholder who must be deemed to be holding the property for and on behalf of the person who ultimately establishes his claim in the Civil Court. This contention seems to be well-founded. A number of authorities were quoted by the learned counsel for both parties, and I refer to the case of *Panna Lal, Biswas* v. *Panchu Ruidas* (1), where the learned Judges laid down the law as supporting the appellant's contention and further held that, as the possession of the Magistrate was in law the possession of the true owner, the defendant's possession, if any, was determined upon the Magistrate's taking possession under the attachment. To the same effect is the decision in *Jagannath Gir* v. *Tirguna Nand* (2). This case was followed by a learned Single Judge of the Judicial Commissioner's Court, Oudh, in *Harkishen Das* v. *Mussammat Sundro Bibi* (3). With these decisions I entirely agree, and in my judgment on general principles no other view is possible. There was a scramble over the property at the time when the Police took action under the provisions of section 145 of the Criminal Procedure Code, and, in order to prevent any breach of the peace, the Magistrate proceeded under section 146 and ordered that the property in dispute be attached. He further ordered that none of the parties should

(1) (1922) I. L. R. 49 Cal. 544. (2) (1915) I. L. R. 37 All. 185.
(3) 1926 A. I. R. (Oudh) 43.

1932

MUHAMMAD HABIT KHAN v. BADI-UL-ZAMAN KHAN.

AGHA HAIDAR J.

interfere with that property. He appointed one Mohammad Israel as Receiver, providing distinctly that he should work under the control of the Court and manage the property and exercise all the powers of a Receiver appointed under the Civil Procedure Code. In view of these proceedings the plaintiff had no alternative except to bring a suit for a declaration. I may point out that Mr. Jagan Nath Aggarwal, who appeared to support the judgment of the Court below, argued that, nothing was done in pursuance of the order of the Magistrate, dated the 29th June, 1925, and that, in fact, the defendant continued in possession as heretofore. He relied upon a number of rent deeds which were filed by his client in support of his possession. But these documents cover a period when disputes had already arisen between the parties and, therefore, much importance cannot be attached to them. Besides, these documents have not been properly proved and none of them is a registered document. There is nothing easier in a case of this description than for a party to produce a number of fictitious documents like those in question.

Another argument put forward by Mr. Jagan Nath Aggarwal, was that Mohammad Israel, who had been appointed a Receiver, did not realise any rents of the property in dispute and, therefore, did not take effective possession of the property, hence the order, dated the 29th June, 1925, passed by the learned Magistrate remained a dead letter. There is no substance in this argument. A reference to the evidence of the defendant on his own behalf shows that Mohammad Israel was appointed as Receiver of the property and that the order of the Magistrate stood intact. Mohammad Israel, D. W. 2, in his evidence

1932

MUHAMMAD HABIT KHAN v. BADI-UL-ZAMAN KHAN.

AGHA HAIDAR J.

has stated that he went to the spot to take possession of the property in dispute, but the tenants refused to recognise him or to give him possession of the property, saying that they would pay rent to him if he brought an order of the Court. The tenants never said that they would not pay the rent until the decision of the Civil Court. The witness, according to his own evidence, remained a Receiver for a period of eight months and made efforts to realise rents but was unsuccessful. He says that he sent his resignation, but there is nothing on the record to show that his resignation was ever accepted. The fact, however, remains that the Court, after attaching the property, took action under section 146 (2) of the Criminal Procedure Code, and appointed Mohammad Israel as Receiver. Under these circumstances the plaintiff could not ask for possession of the property since the same was not in the possession of the defendant but under the attachment ordered by the Court and in the possession and management of the Receiver appointed by it. The suit, therefore, for a declaration was properly framed and the learned Judge was in error in holding that the plaintiff ought to have brought a suit for possession.

I may point out that the trial Judge has made a slight error of fact in his judgment where he says that the property was not actually delivered to the Receiver Mohammad Israel. The evidence of Mohammad Israel is directly contrary to this statement and there cannot be any doubt that Mohammad Israel received a *parwana* from the criminal Court and, armed with this document of authority, went to discharge his duty by collecting the rents of the property. Possession, therefore, must be taken to have been given to

1932

MUHAMMAD HABIT KHAN v. BADI-UL-ZAMAN KHAN.

AGHA HAIDAR J.

him by the Court. As to whether he was successful in realising rents of the property or not is a matter which does not really touch the point in controversy.

I would, therefore, allow this appeal and, setting aside the judgment and decree of the trial Judge, dated the 25th November, 1927, remand the case to the Senior Subordinate Judge, Lahore, under Order 41, rule 23 of the Civil Procedure Code, for trial and disposal in accordance with law. The appellant shall get his costs in this Court. Other costs shall abide the result. As the case has been decided on a preliminary point and the decision of the Court below on that point has been reversed the plaintiff-appellant is entitled to have a refund of the court-fee paid on the memorandum of appeal in this Court. Parties are directed to appear before the Senior Subordinate Judge, Lahore, on the 16th January, 1933, in order to get a date fixed for evidence on the remaining issues in the case.

ADDISON J.—I agree.

*A. N. C.*

*Appeal accepted;*
*Case remanded.*