

succession to non-ancestral property. There is no other evidence in support of the alleged custom.

I would accordingly accept the appeal, set aside the judgment and decree of the learned District Judge and restore that of the Court of first instance with costs throughout.

DALIP SINGH J.—I agree.

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Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Dalip Singh JJ.

SAIN DASS (PLAINTIFF) Appellant,

versus

UJAGAR SINGH AND ANOTHER (DEFENDANTS)

Respondents.

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June 13.

Regular First Appeal No. 357 of 1938.

Civil Procedure Code (Act V of 1908), S. 2 (2) — Decree — Suit for two of the three separate properties, subject matter of suit — dismissed and not appealed against — Whether a final adjudication between the parties and amounts to a decree and not merely an interlocutory order — Declaration of right by a Court in the nature of futility — Whether Court should grant it.

S. obtained a money decree against T., son of B. In execution thereof he attached a bungalow known as "Cosynook" and one-fourth share in *Serai* and in the building known as *Damdama*. B. objected to the attachment alleging that the attached properties belonged to him exclusively and that the judgment-debtor had no interest in them. The judgment-debtor filed objections stating that he had only a right of residence in "Cosynook" and that this right was exempt from attachment and sale under s. 60 (i) (n) of the Code of Civil Procedure, and that he had no interest in the other two properties which could be attached and sold. On the basis of a statement made by S. that execution of his decree should proceed against the property "Cosynook" only,

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as he did not wish to proceed against the judgment-debtor's share in the other two properties, the Court released the two properties and restricted the enquiry to "Cosynook" only, and subsequently released "Cosynook" also from attachment, holding that "Cosynook" was owned by B. and that T. had only a right of residence in it and he was not competent to dispose of it. On the decree-holder's appeal, the High Court also held that "Cosynook" could not be attached and sold in execution of the decree. In the meantime the decree-holder instituted a suit under O. XXI, r. 63 of the Code of Civil Procedure against B. and T. for a declaration that T. had a saleable interest in "Cosynook" and one-fourth share in the *Serai* and the building *Damdama* respectively and that the three properties were liable to attachment and sale in execution of his decree. The trial Judge held on 21st December, 1937, that the plaintiff decree-holder having withdrawn the attachment against the *Serai* and *Damdama* was not competent to maintain a suit for declaration against either defendant in respect of the two properties and further that the judgment-debtor's interest in "Cosynook" was not liable to attachment and sale in execution of the decree in view of the previous decision which was affirmed by the High Court. A decree sheet was prepared dismissing the plaintiff's suit against T. in respect of all the three properties and against B. in respect of *Serai* and *Damdama*. No appeal was preferred against this decision by the decree-holder and the suit proceeded against B. in respect of "Cosynook" only which was dismissed on 11th July, 1938. The plaintiff appealed against this decree impleading both B. and T. as respondents.

Held, that the plaintiff not having appealed against the decree passed by the lower Court on 21st December, 1937, was not entitled to agitate in the present appeal matters which had been finally decided between the parties. That the judgment of the Court of that date was a final adjudication between the parties relating to the matter decided by it and not merely an interlocutory order and was therefore a decree as defined in s. 2 (2) of the Code of Civil Procedure which had become final as no appeal had been preferred against it.

Held further (dismissing the appeal), that though the plaintiff's claim against B. in respect of "Cosynook" was

competent, it was futile to give any adjudication on the merits in respect thereof as any declaration given by the Court in the circumstances would be entirely barren and a Court should not grant a declaration of a right which would be stamped with something in the nature of futility.

Janaki Ammal v. Narayansami Aiyer (1), followed.

First appeal from the decree of Lala Sultan Singh, Subordinate Judge, 1st Class, Rawalpindi, dated 11th July, 1938, dismissing the plaintiff's suit.

MELA RAM and NAND LAL SALUJA, for Appellant.

D. R. SAWHNEY, GURBACHAN SINGH and SHAMAIR CHAND, for Respondents.

TEK CHAND J.—The appellant, Sain Das Chawla, obtained a money decree against *Tikka Sant Singh*, son of *Baba Ujagar Singh*, Bedi, from the Court of the Senior Subordinate Judge, Rawalpindi, on the 20th November, 1933. In execution of the decree, he attached a bungalow known as “Cosynook” at Murree, and one-fourth share in *Sarai Baba Khem Singh* and in the building known as *Damdama Sahib* at Rawalpindi. *Baba Ujagar Singh* objected to the attachment, alleging that the attached properties belonged to him exclusively and that the judgment-debtor had no interest in them. The judgment-debtor also filed objections saying that he had only a right of residence in “Cosynook” and that this right was exempt from attachment and sale under section 60 (1) (n) of the Civil Procedure Code. He also averred that he had no interest in the other two properties which could be attached and sold. In the course of the enquiry into the objections, the decree-holder made a statement on the 2nd November, 1935, that “for the time being” he did not wish to proceed against the

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judgment-debtor's alleged share in the Damdama Sahib and *Sarai Baba Khem Singh* and that execution should proceed against "Cosynook" only. On this statement, the executing Court released these two properties and restricted the enquiry to "Cosynook." Subsequently, relying on a decree passed by the Senior Subordinate Judge, Lahore, on the 27th February, 1928, in terms of the award of Nawab Mohammad Hyat Khan Noon, dated the 9th of November, 1927, it held that "Cosynook" was owned by *Baba Ujagar Singh* and that *Tikka Sant Singh* had only a right of residence in it and that he had no power to dispose of this right. It accordingly allowed the objections and released "Cosynook" from attachment. From this decision the decree-holder preferred an appeal to this Court. The appeal was decided by Agha Haidar J., sitting in Single Bench, on the 26th May, 1936 [*Sain Das v. Tikka Sant Singh* (1)]. The learned Judge affirmed the finding of the executing Court that "Cosynook" could not be attached and sold in execution of the decree, but he held that it was liable to be dealt with by way of "equitable execution" and he ordered that a Receiver be appointed to collect the rent and after deducting the expenses, pay it to the decree-holder till the decretal amount was discharged. From this order the judgment-debtor preferred an appeal under the Letters Patent, but the appeal was dismissed on the 14th January, 1937 [*Sant Singh v. Sain Das* (2)].

In the meantime, on the 13th of October, 1936, the decree-holder had instituted a suit under Order XXI, rule 63, Civil Procedure Code, against *Baba Ujagar Singh* and *Tikka Sant Singh* for a declaration that

(1) 1936 A. I. R. (Lah.) 830.

(2) I. L. R. [1937] Lah. 486.

the latter had a saleable interest in one-half of "Cosynook" and one-fourth of *Sarai Baba Khem Singh* and *Damdama Sahib*, respectively, and that all the three properties were liable to attachment and sale in execution of the decree to the extent stated. The suit was resisted by both the defendants on various pleas. The learned Subordinate Judge, at first framed the following three preliminary issues:—

- (1) Whether the plaintiff is entitled to maintain this suit in respect of *Damdama Sahib* and *Sarai Baba Khem Singh*?
- (2) How does the statement of the plaintiff, dated the 2nd November, 1935, releasing these properties from attachment, affect the present suit?
- (3) What is the effect of the decision of the High Court, dated the 26th May, 1936, on this suit?

These issues were decided by the learned Subordinate Judge on the 21st December, 1937. He held that the plaintiff decree-holder having withdrawn the attachment against *Damdama Sahib* and the *Sarai* was not entitled to maintain a suit for declaration against either defendant under Order XXI, rule 63, Civil Procedure Code, or under section 42 of the Specific Relief Act in respect of these two properties. He, further, held that in view of the decision in the execution proceedings that the judgment-debtor's interest in "Cosynook" was not liable to attachment and sale in execution of the decree, which had been affirmed by the High Court on appeal, the plaintiff's suit against the judgment-debtor *Tikka Sant Singh* was barred by section 47, Civil Procedure Code. He, accordingly, dismissed the suit against *Tikka*

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Sant Singh in respect of all the three properties and against *Baba Ujagar Singh* in respect of *Sarai* *Baba Khem Singh* and *Damdama Sahib*. He held, however, that the suit as regards "Cosynook," could proceed against *Baba Ujagar Singh* only. In accordance with this judgment, a decree-sheet was prepared on the 21st of December, 1937, dismissing the plaintiff's suit against *Tikka Sant Singh* in respect of all the three properties and against *Baba Ujagar Singh* in respect of the *Sarai* and *Damdama Sahib*. No appeal against this decision was preferred by the decree-holder.

The suit proceeded against *Baba Ujagar Singh* in respect of "Cosynook." Issues were framed on the merits and after evidence for the parties had been recorded, the learned Judge, on the 11th July, 1938, dismissed the suit against *Baba Ujagar Singh* *qua* this property also, leaving the parties to bear their own costs.

From this decree, dated the 11th July, 1938, the plaintiff has appealed, impleading both *Baba Ujagar Singh* and *Tikka Sant Singh* as respondents. In this appeal the appellant has challenged not only the decision of the lower Court in favour of *Baba Ujagar Singh* in respect of "Cosynook" as given in the judgment of the 11th July, 1938, but also the decree of the lower Court, dated the 21st December, 1937, dismissing the suit relating to "Cosynook" against *Tikka Sant Singh* and the suit in respect of the *Sarai* and *Damdama Sahib* against both defendants.

A preliminary objection is raised on behalf of the respondents that the plaintiff not having appealed against the decree passed by the lower Court on the 21st December, 1937, is not entitled to agitate in this

appeal matters which had been finally decided between the parties by that decree. After hearing counsel for the appellant I am of the opinion, that this contention is well-founded and must succeed. The learned counsel for the appellant urges that the decision of the lower Court, dated the 21st December, 1937. did not amount to a "decree" but was merely an interlocutory order passed in the course of the suit and that the order was not appealable. This argument is without any force whatever. As has been stated above, the Court had, by its judgment of that date, dismissed the suit against *Tikka Sant Singh* with regard to all the properties which were the subject matter of the suit and against *Baba Ujagar Singh* with regard to the *Sarai* and the *Damdama*. This was clearly a final adjudication between the parties relating to these matters and was, therefore, a "decree" as defined in section 2, clause (2) of the Civil Procedure Code. An appeal from this decree lay under section 96 of the Code, but no such appeal was filed within the period of limitation prescribed by law and, therefore, the decree has become final and is not liable to attack now on appeal from the decree relating to other matters, which had been left undecided. Mr. Mela Ram in support of his contention referred us to a decision of the Chief Court reported as *Gehna v. Khuda Bakhsh* (1). That case, however, is clearly distinguishable, as there an issue relating to *res judicata* had been decided in favour of the plaintiff, it being held that the suit could proceed and that the former decision relied upon did not bar the suit. That order was clearly of an interlocutory nature: there was no final determination of the rights of the parties in regard to the subject matter of the

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suit, or any part thereof, and, therefore, it did not amount to a 'decree.'

It was further argued that the Subordinate Judge should not have decided the suit piece-meal. But the suit, in this case, was a composite suit, relating to different subject-matters in which different reliefs were claimed against the two defendants. It was, therefore, competent to the Court to decide the dispute relating to the various properties separately. It is conceded that the plaintiff could have brought three separate declaratory suits relating to each property and each suit could have been dealt with separately. It, therefore, makes no difference that the plaintiff has joined the three claims in one suit. Further, the Court, in this case, did, as a matter of fact, give a final adjudication relating to some of the subject-matters in dispute on the 21st December and passed a formal decree on that date. If the plaintiff considered the judgment or the decree to be illegal or wrong on the merits, his remedy was by way of appeal or review, but he not having availed himself of either of these remedies, the decision has become final and unassailable and cannot be challenged now in regard to the matters finally determined by it. The present appeal against *Tikka* Sant Singh is, therefore, clearly incompetent and so also against *Baba* Ujagar Singh with regard to the *Sarai* and *Damdama* Sahib.

The only remaining point is the claim against *Baba* Ujagar Singh in respect of "Cosynook." Though the plaintiff's appeal against *Baba* Ujagar Singh relating to this matter is competent, but in view of the decision as regards the rights of *Tikka* Sant Singh in this property it is futile to give any adjudication on the merits in regard to this property.

Admittedly, any declaration given by us would, in the circumstances, be entirely barren, and as observed by their Lordships of the Privy Council in *Janaki Ammal v. Narayanasami Aiyer* (1) a Court will not grant a declaration of right which "would be stamped with something in the nature of futility." As stated already, it has been decided in the course of the execution proceedings—and that decision (whether right or wrong on the merits) is final as between the plaintiff and *Tikka Sant Singh*—that the latter had no saleable interest in this property which could be attached and sold in execution of the plaintiff's decree against him, and the only relief by way of "equitable execution" which could be given to the plaintiff has been granted to him. This being so, it is wholly useless to decide for the purposes of the execution of the decree of the plaintiff against *Tikka Sant Singh*, as to what the rights of *Baba Ujagar Singh* in this house are.

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The appeal fails and I would dismiss it with costs.

Baba Ujagar Singh has filed cross-objections against that part of the decree of the lower Court which left the parties to bear their own costs of that suit. After hearing his counsel I can find no substance in this objection. In the circumstances of the case, the lower Court had exercised a sound judicial discretion in leaving the parties to bear their own costs. I would, therefore, dismiss the cross-objection with costs.

DALIP SINGH J.—I agree.

A. N. K.

Appeal dismissed.