

rests on the wife, and it protects the husband against any proceedings for maintenance which the wife may institute under section 488 of the Criminal Procedure Code. Such a decree, therefore, does serve a really useful purpose. In this case I feel not the slightest hesitation in saying that the direction that the decree shall not be executed by imprisonment ought to be added, for though it is perfectly true that the wife certainly ought not to be able to secure separate maintenance, it is equally true that it would be ludicrous to send her to jail for refusing to live with her husband whom she at one time apparently had attempted to murder. I, therefore, agree with the order proposed.

Decree amended.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

GOBA NATHU BAROLA (ORIGINAL PLAINTIFF), APPELLANT *v.* SAKHARAM TEPI PATIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS^o.

1920.

February 10.

Civil Procedure Code (Act V of 1908), section 47—Decree-holder—Auction-purchaser—Resistance to taking of possession of property by judgment-debtor and by a third party—Suit against both to recover possession maintainable.

The plaintiff obtained a decree against defendant No. 1, in execution of which the property in dispute was sold, and purchased by the plaintiff with leave of the Court. In seeking to take possession of the property, the plaintiff was obstructed by the judgment-debtor (defendant No. 1) as also by a stranger (defendant No. 2). The plaintiff filed a suit to recover possession of the property from both defendants; but it was objected that the suit was barred by section 47 of the Civil Procedure Code :—

Held, overruling the objection, that the defendant No. 2 not being a party to the original suit, the plaintiff's proper remedy to get possession of the

^o Second Appeal No. 95 of 1919.

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property purchased at the court-sale was by filing a suit against both defendants although one of them was a judgment-debtor of the plaintiff.

Sadashiv bin Mahadu v. Narayan Vithal⁽¹⁾, distinguished and doubted.

Bhagwati v. Banwari Lal⁽²⁾, approved.

SECOND appeal from the decision of G. D. Madgaokar, District Judge of Khandesh, reversing the decree passed by and remanding the suit to D. M. Mehta, Joint Subordinate Judge at Jalgaon.

Suit to recover possession of property.

The plaintiff obtained a decree against defendant No. 1. In execution of the decree, the property in dispute was sold, and purchased by the plaintiff with leave of the Court.

When the plaintiff attempted to recover possession of the property, he was resisted not only by defendant No. 1, but also by his brother defendant No. 2, who was not a party to the suit and who claimed the property as his own.

The present suit was therefore filed against both defendants to recover possession of the property.

The trial Court held, on the strength of *Sadashiv bin Mahadu v. Narayan Vithal*⁽¹⁾, that the suit was barred by the provisions of section 47 of the Civil Procedure Code, 1908.

On appeal, the decree was confirmed so far as defendant No. 1 was concerned. The learned Judge in appeal was further of opinion that section 47 did not bar the suit against defendant No. 2 who was not a party to the first suit. He, therefore, reversed the decree dismissing the suit against defendant No. 2 and ordered the suit to be retried as against him alone.

The plaintiff appealed to the High Court against the decree dismissing his suit against defendant No. 1.

⁽¹⁾ (1911) 35 Bom. 452.

⁽²⁾ (1908) 31 All. 82.

P. B. Shingne, for the appellant.

No appearance for the respondents.

MACLEOD, C. J.:—The plaintiff in execution of his decree purchased the suit property with leave of the Court. Not being able to get possession after his purchase, he brought this suit against the 1st defendant, his judgment-debtor, and the 2nd defendant, who claimed to have an interest in the property, but who did not fill the position of a judgment-debtor with regard to the plaintiff. The trial Court dismissed the suit as against both defendants on the ground that the plaintiff was the representative of the decree-holder, and the suit was barred under section 47 of the Civil Procedure Code.

In appeal the decree of the trial Court dismissing the suit as against the 1st defendant was upheld, but the decree dismissing the suit as against the 2nd defendant was set aside and the suit was remanded for trial.

The plaintiff has appealed against that part of the decree which dismissed his suit against the 1st defendant. The 1st defendant has not appeared, and we have not had the advantage of hearing what he might say on the question before us. No doubt in the case of *Sadashiv v. Narayan*⁽¹⁾, it was held by a Bench of this Court that a decree-holder by becoming a purchaser at a Court-sale did not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code, and that therefore, proceedings for delivery of possession of the property purchased by the decree-holder were proceedings in execution of the decree, and fell within the scope of section 47 of the Civil Procedure Code. Now in this case if defendant No. 2 had not been a party to the suit, the facts of the case would have brought the suit within that decision. Here we have another party claiming title to the property purchased

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who was not a party to the original suit, and that I think distinguishes this case from *Sadashiv bin Mahadu v. Narayan Vithal*⁽¹⁾. If the judgment of the lower appellate Court were to stand, it would follow that the plaintiff would have to proceed in execution proceedings against the 1st defendant, and file a suit against the 2nd defendant. The execution proceedings against the 1st defendant might result in his having to file another suit against the 1st defendant, if the matters in dispute between him and the 1st defendant could not be decided except by means of a suit. That would be a very unfortunate result. For myself I feel inclined to doubt the decision in *Sadashiv bin Mahadu v. Narayan Vithal*⁽¹⁾. I would prefer to follow the decision of the Full Bench of the Allahabad High Court in *Bhagwati v. Banwari Lal*⁽²⁾. However that may be, in this case I think I can come to the conclusion that although the plaintiff remains a party to the suit as against the 1st defendant, yet the 2nd defendant, not being a party to the suit, the plaintiff's proper remedy in order to get possession of the property purchased at the Court-sale would be by filing a suit against both the 1st and 2nd defendants. By purchasing the property the plaintiff no doubt does not cease to be a party to the suit. But he fills quite a different capacity as auction-purchaser. It appears to me, that it would be more correct to say that as auction-purchaser he acquires a different set of rights which entitle him to come to the Court for protection by filing a suit, instead of proceeding in execution. I would, therefore, reverse the decree of the lower appellate Court dismissing the suit against the 1st defendant, and direct that the suit against both the defendants should be remanded for evidence, trial and adjudication on the merits. The appellant must have his costs of the appeal.

(1) (1911) 35 Bom. 452.

(2) (1908) 31 All. 82.

HEATON, J. :—I concur. Whether the decision in *Sadashiv bin Mahadu v. Narayan Vithal*⁽¹⁾, is correct or not (and I think it may need reconsideration), yet the case as presented by the plaintiff here is certainly not one which can be summarily dismissed on the ground that the suit will not lie. Whatever the true facts may be, the plaintiff is seeking to recover possession from two persons defendant No. 1 and defendant No. 2, and the relief he asks for against defendant No. 2 he could not obtain by proceedings in execution. Therefore he is driven to bring a suit, and as my Lord the Chief Justice has pointed out, it would really be a legal absurdity to compel him for one matter which ought to be disposed of as one case, to take separate proceedings; first, proceedings in execution against defendant No. 1; and then a suit against defendant No. 2. However involved our law of procedure may be, I feel quite certain that it was never intended to produce results of that kind.

Decree reversed.

R. R.

⁽¹⁾ (1911) 35 Bom. 452.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

HANMANT TIMAJI DESAI (ORIGINAL DEFENDANT No. 1), APPELLANT v. RAGHAVENDRA GURURAO DESAI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS °.

1920.

February 12.

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Instalment decree—Failure to pay one instalment—Durkhast to recover amount of the instalment by sale of a portion of the property mortgaged—Premature durkhast.

A decree passed on a mortgage was made payable in instalments and provided that if any two instalments remained unpaid till six months after the date of the second instalment, the whole amount of the decree then remaining

° First Appeal No. 6 of 1919.