1870

ANAND CHANDRA PAL v. PANCHILAL SARMA.

On the case which is stated to us in this reference, I must assume that the proceedings of the Zilla Judge were regular. I do not think that the vesting order made by the Insolvent Court affected his jurisdiction to continue the execution proceedings and to order the sale of the attached property, if in the due exercise of his judicial discretion he thought fit to do so. It is not expressly said that he had the Official Assignee before the Court after the transfer of property effected by the vesting order and before making the sale, but I cannot suppose that he omitted this step, and indeed it seemed to be admitted in the argument that the Official Assignee had been heard in the Zilla Court. It is not our concern to enquire whether or not the Judge might with propriety have stayed the execution proceedings; we must take it that he did in fact order the sale in due course, and I think, consequently, that that sale operated to pass the property out of the hands of the Official Assignee into those of the purchaser-defendant, and that the Official Assignee was thus left without anything to sell to the plaintiff.

Before Sir Richard Couch, Kt, Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Phear, and Mr. Justice Mitter.

1870
May 16.

RADHA PYARI DEBI CHOWDHRAIN AND OTHERS (PLAINTIFFS) *v.* NABIN CHANDRA CHOWDHRY (DEFENDANT).*

Act VIII of 1859, *s.* 230—*Evidence—Title—Possession.*

See also 11 B.L.R. 239.

On an application under section 230, Act VIII of 1859, in the investigation of the matter in dispute, the Court may go into the question of title. It is open to the applicant to give evidence of title beyond mere possession, and the decree-holder may prove his title to the property.

ONE Nabin Chandra Chowdhry obtained a decree against the Government for possession of certain fisheries, and in execution of his decree he obtained possession of them. The plaintiffs in the several cases applied to the Court, under section 230 of Act VIII of 1859, stating that they had severally been in possession of the said fisheries; that the fisheries belonged to them; that

* Regular Appeals, Nos. 182, 184, 189 and 213 of 1868, from a decree of the Judge of Rungpore, dated the 10th December 1868.

they were not parties to the suit in which the decree was passed, and praying to be restored to possession.

The Judge found that there were conflicting claims regarding the fisheries in dispute, and dismissed all the suits, leaving the several plaintiffs to their remedy by suit.

On appeal, the High Court (NORMAN and E. JACKSON, JJ.) remanded the several cases for trial of the following issues in each:

Was the claimant really and *bonâ fide* in possession of the fisheries claimed, at the time of the execution of the decree?

Was he dispossessed by the decree-holder in execution of the decree?

On remand, the Judge passed decrees in favor of the plaintiffs in cases Nos. 182, 184, and 213, and dismissed the case No. 198.

Objections were filed to the several findings of the Judge.

The appeal in case No. 198 came on for hearing before a Division Bench (NORMAN and E. JACKSON, JJ.) On account of the conflicting decisions in *Nujeender Chunder Ghose* v. *Ram Comul Mundul* (1), *Mahomed Ausur*, v. *Prokash Chunder Sha* (2), *Ajoo Khan* v. *Kisto Pershad Lahoory* (3), their Lordships referred the following questions for the decision of a Full Bench, *viz.*:

"Whether a person, who has been dispossessed of land or fisheries in execution of a decree against a third person to which he is no party, is bound to prove anything more than that he was really and *bonâ fide* in possession, and dispossessed in execution of such decree?

"Whether the decree-holder can put the plaintiff to proof of his title, or, on an application numbered and registered as a suit under section 230, in answer to and not merely as controverting the plaintiff's evidence of possession, can go into evidence of title himself?"

Baboo *Srinath Das* for the appellants.

Baboos *Aushutash Chatterjee* and *Mahini Mohan Roy* for the respondents.

(1) 3 W. R., 213.
(2) 8 W. R., 8.
(3) 8 W. R., 477.

1870

RADHA PYARI DEBI CHOWDHRANI v. NABIN CHANDRA CHOWDHRY.

The following were the opinions of the Full Bench :—

COUCH, C. J.—We must endeavour to collect the intention of the Legislature in section 230 from the language which they have used. It appears to me that, looking to that language, the title may be gone into in an application under that section. The section provides for the case where a party in a suit for the recovery of immoveable property has obtained a decree, and the decree is about to be executed. It says that, "if any person, other "than the defendant, shall be dispossessed of any land or other "immoveable property in execution of a decree, and such person "shall dispute the right of the decree-holder to dispossess him of "such property under the decree, on the ground that the property "was *bonâ fide* in his possession on his own account or on account "of some other person than the defendant, and that it was not "included in the decree, or, if included in the decree, that he was "not a party to the suit in which the decree was passed, he may "apply to the Court within one month from the date of such dis-"possession; and if, after examining the applicant, it shall appear "to the Court that there is probable cause for making the appli-"cation, the application shall be numbered and registered as a suit "between the applicant as plaintiff and the decree-holder as defend-"ant." Then it says what is to be done,—namely, that "the Court "shall proceed to investigate the matter in dispute." Now what is the matter in dispute? I think that the matter in dispute is the right of the decree-holder to dispossess the applicant of the property under the decree, and the subsequent words which state the grounds upon which the applicant may come to the Court do not restrict the meaning of those words, but are intended to show the cases in which the applicant is entitled to come to the Court. Unless he can show that he was *bonâ fide* in possession on his own account or on account of some other person, he has no right to apply to the Court, but if he can show that, and if the Court is satisfied that there was probable cause for his application, the Court may receive it and proceed to investigate the matter; but still the matter in dispute appears to me to be the right of the decree-holder to dispossess him. So far, then, I think that there is nothing in this section to show that the matter to be tried was limited merely to the question of possession; but then

we come to the words that the Court " is to investigate the " matter in the same manner and with the like powers as if a suit " for the property had been instituted by the applicant against the " decree-holder." Now, if a suit for the property had been instituted by the applicant against the decree-holder, instead of having been instituted by the decree-holder against some other person, the title would have been gone into. A suit instituted to recover the property, and not to recover merely the possession, is a suit in which there would have been an enquiry into the title. Looking then at these words, it appears to me that we may collect that it was the intention of the Legislature, in a case of this kind, that if the Court should be satisfied that there was a probable ground for the application, the title should be tried between the parties; and the mode of proceeding provided is that the applicant may come in and show that he was really entitled to the property, and that the decree obtained by the decree-holder for the recovery of it was obtained against the wrong person, and was not binding in any way upon the applicant. This construction appears to me to be somewhat strengthened by the words of section 231, which says that no future suits " shall be entertained in any Court " between the same party or parties claiming under them in " respect of the same cause of action." The cause of action in a suit for the recovery of property under section 230 would be the dispossession under the decree. It may certainly be that the applicant might show that there was a dispossession of the property at some other time, and possibly in that way he might escape from being bound by section 231; but it appears to me that the Legislature using the words " in respect of the same cause of action" really contemplated the case of the applicant asserting his title to the property, saying that he has been dispossessed of it, and that it was his, and bringing a suit for the recovery of it; and that they intended to treat the proceedings under section 230, as if the applicant had brought a suit. I cannot say that the language of the section is as clear as it might be, but it appears to me that it may fairly be collected from the language used that that was the intention of the Legislature. Then we must apply that construction to the questions which have been put to us, and which perhaps require to be

1870

RADHA PYARI DEBI CHOWDHRANI v. NABIN CHANDRA CHOWDHRY.

answered in some special manner. The first question is "whether a person who has been dispossessed of land or fisheries in execution of a decree against a third person, not a party to the case, is bound to prove anything more than that he was really and *bonâ fide* in possession, and dispossessed in execution of the decree." Now it does not follow from the Court having the power to go into the question of title, that the applicant, or the plaintiff in such a case, is bound to prove more than that he was really and *bonâ fide* in possession. If he proved that, it would be evidence of title upon which he might rest his case, and if he did not choose to go into evidence of his title, we cannot say that he was bound to do it. Now, with regard to the first branch of the second question, whether the decree-holder can put the plaintiff to proof of his title, although we say that the decree-holder can do so, he cannot insist upon direct proof of title, and the plaintiff may, if he thinks fit, rely upon his possession; but, as to the latter branch of the question, whether the decree-holder can go into evidence of title in himself, we must say that he can; if he has a good title he is at liberty to give evidence of that title and to prove that he is really the person to whom the property belongs, and that it should not be taken in execution of the decree. This is the way in which it appears to me these questions must be answered.

KEMP, J.—I am of the same opinion.

JACKSON, J.—I am of the same opinion. I think that sections 230 and 231 of the Code of Civil Procedure must be read together, and that the terms of the last mentioned section will very materially assist us in coming to a conclusion as to what the Legislature meant by the first mentioned section.

The earlier words of section 230 refer to the circumstances which will entitle a party to make application to the Court under this section,—that is to say, that the property which has been the subject of dispossession "was *bonâ fide* in his posses-
"sion on his own account, or on account of some other person
"than the defendant, and that it was not included in the decree,
"or if included in the decree, that he was not a party to the suit

1870

RADHA PYARI DEBI CHOWDHRANI v. NABIN CHANDRA CHOWDHRY.

" in which the decree was passed ;". and then follow the words " if, after examining the applicant, it shall appear to the Court " that there is probable cause for making the application," that is to say, that the Court is to satisfy itself of the existence of those circumstances, namely, that the applicant was *bonâ fide* in possession as stated above, and that the land was not included in the decree, or, if included, that he was not a party to the suit in which the decree was passed ; and the Court, on becoming satisfied that there was such probable cause as that for making the application, is then empowered to deal with the matter, and treat it as if it were " a suit between the applicant as plaintiff, " and the decree-holder as defendant," and proceed to investigate the matter in dispute " in the same manner as if a suit for the pro- " perty had been instituted by the applicant against the decree- " holder."

I concur with the learned Chief Justice in thinking that the matter in dispute is the enlarged subject-matter which the Court arrives at, after satisfying itself of the existence of the cause for making the application ; and that the power conferred upon the Court in investigating the matter and passing a decision is the same as in an ordinary civil suit. That decision, under section 231, is " of the same force as a decree," that is, a decree for the property " subject to appeal ;" that would be an appeal to determine whether the decision as to the right to the property was correct : and then the section concludes with saying " that no fresh suit shall be entertained in any Court between " the same party or parties claiming under them in respect " of the same cause of action."

The course of procedure, it will be seen, is in marked contrast with that laid down in section 246, on a somewhat cognate subject. There it is said that an " order passed by the Court under " this section shall not be subject to appeal, but the party against " whom the order may be given, shall be at liberty to bring a suit to establish his right." Then when the Legislature, by this section, debars the party or parties claiming under him from bringing a fresh suit in respect of the same cause of action, which, I apprehend, would be a suit based upon the dispossession under that decree, and in which the plaintiff would seek to establish

1870

RADHA PYARI DEBI CHOWDHRANI v. NABIN CHANDRA CHOWDHRY.

his title, they would not have excluded him from bringing a fresh suit unless they had at the same time given him the means and opportunity of adducing every thing he could to entitle him to succeed, and consequently unless he had been competent to prove his title in those proceedings.

As to the particular mode in which the question should be answered, I entirely concur with the Chief Justice.

PHEAR, J.—I do not dissent.

MITTER, J.—I concur in this judgment.