

## APPELLATE CIVIL.

*Before Mr. Justice Mitra and Mr. Justice Caspersz.*

MATIRAM MARWARI

v.

RAMKUMAR MARWARI.\*

1907  
Nov. 29.

*Execution of decrees—Civil Procedure Code (Act XIV of 1882) ss. 244 and 583—Reversal of decree on appeal, effect of—Separate suit, maintainability of.*

Section 244 of the Civil Procedure Code does not apply in its entirety to proceedings had under section 583 of the Code for restitution of property taken in execution of a decree which is reversed in appeal.

*Shama Purshad Roy Chowdhury v. Hurro Purshad Roy Chowdhury*(1), *Hurro Chunder Roy Chowdhury v. Shoorodhoney Debia*(2), *Shurnomoyee v. Pattarri Sirkar*(3), *Jamini Nath Roy v. Dharma Das Sur*(4), referred to.

SECOND APPEAL by the plaintiff, Matiram Marwari.

This appeal arose out of an action brought by the plaintiff for a declaration that the defendant, Jaharmal Marwari, had no saleable interest in a property for which the plaintiff had paid a considerable sum of money in *benami* of one Ram Chandra Chowdhury, and that the defendant was not entitled to levy execution for the said sum. Jaharmal Marwari having died after the decision of the original suit, his sons Ram Kumar Marwari and another were substituted in his place.

The plaintiff alleged that he had obtained a money-decree in the Court of the Subordinate Judge of Burdwan against the defendant, and in execution of that decree some property said to belong to the defendant was sold for Rs. 3,000, and the auction purchaser, Ram Chandra Chowdhury Marwari, obtained symbolical possession of the property. Thereupon, one Jagannath

\* Appeal from Appellate Decree, No. 1232 of 1905, against the decree of A. E. Harward, District Judge of Burdwan, dated May 29, 1905, confirming the decree of Gopi Krishna Banerjee, Subordinate Judge of Burdwan, dated July 29, 1904.

(1) (1865) 10 Moo. I. A. 203.

(3) (1878) I. L. R. 4 Calc 625.

(2) (1868) 9 W. R. 402

(4) (1906) I. L. R. 33 Cal'c. 857.

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Marwari put in an objection under s. 355 of the Code of Civil Procedure, on the ground that he had purchased the said property at a private sale from the defendant Jaharmal by a registered *kobala*, before the plaintiff had obtained his decree against Jaharmal. His objection was allowed, and he was restored to possession of the property. Ram Chandra Marwari then brought a regular suit for declaration of his title to and recovery of the property; the suit was dismissed on the ground that Ram Chandra was the plaintiff's *zenamidar*; and an appeal from the decree dismissing the suit also failed. In the meantime, the decree obtained by the plaintiff against Jaharmal was set aside in appeal by the High Court. Thereupon Jaharmal applied for restitution under s. 583 of the Code of Civil Procedure and prayed for the refund of the Rs. 3,000 paid to the plaintiff for the auction price of Jaharmal's property. The plaintiff put in an objection and the objection was disallowed; an appeal against that order also failed. The execution proceedings were subsequently struck off for default. Jaharmal again applied for the recovery of the said amount, the plaintiff objected, and his objection was disallowed. Hence the present suit.

The Court of first instance dismissed the plaintiff's suit on the ground that the suit was barred by s. 244 of the Code of Civil Procedure. On appeal the learned District Judge affirmed the decision of the first Court.

Against this decision the plaintiff appealed to the High Court.

*Babu Golap Chandra Sarkar* (*Babu Digambar Chatterjee* with him), for the appellant, contended that s. 244 of the Code of Civil Procedure could not be a bar to this suit; it was not a matter relating to the execution of any decree, it related to matters which came to pass after the decree came to an end: see *Hira Lal Chatterji v. Gour Moni Debi*(1), *Coffin v. Karbari Rawal*(2), *Harro Chunder Roy Chowdhury v. Sheorodhonce Debia*(3), *Shurnomoyee v. Pattarri Sirkar*(4). If Jaharmal could get anything it was not under section 583 or under section 244 of the Code, but under

(1) (1886) I. L. R. 13 Calc. 326.

(3) (1868) 9 W. R. 402.

(2) (1895) I. L. R. 22 Calc. 501.

(4) (1878) I. L. R. 4 Calc. 625.

the inherent power of the Court to give back what was taken under an erroneous order: see *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah*(1), *Raja Singh v. Kooldip Singh*(2). The purchase-money was not Jaharmal's, he therefore could not get the money. He might get the property back.

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*Dr. Rashbehary Ghose* (*Babu Sharat Chandra Roy Chowdhry* with him), for the respondent. The history of the case shewed that the plaintiff's conduct had been throughout fraudulent; he got a decree which was set aside, he applied for permission to bid which was rejected and then he said that he had purchased *benami*. He also brought a suit through Ram Chandra but would not make Jaharmal a party. The suit was barred by reason of the provisions of s. 244 of the Civil Procedure Code, and also by reason of the orders in the execution cases which operated as *res judicata*.

MITRA AND CASPERSZ, JJ. On the 9th January 1894 the plaintiff appellant obtained a decree for money against Jaharmal Marwari, and, in execution thereof, on the 2nd April 1894, caused a sale of certain immovable property as the property of Jaharmal. Ram Chandra Chowdhury was the highest bidder at the sale, and he paid in Rs. 3,000 as the purchase money. The sale was confirmed, and Ram Chandra obtained possession. Jagannath Marwari, however, claimed the property as his by purchase from Jaharmal before the plaintiff appellant had obtained his decree against Jaharmal, and he was successful in a proceeding under section 335 of the Code of Civil Procedure. He was restored to possession. Thereupon Ram Chandra instituted a suit against Jagannath for declaration of title and possession. The suit was dismissed on the 28th February 1898 on the ground that Ram Chandra was merely a *benamidar* of the plaintiff appellant and could not sue for a declaration of title to immovable property and for possession, and the appeal of Ram Chandra from the decree dismissing his suit was also dismissed on the 14th December 1898. The result of these proceedings was that the purchase by Ram Chandra became void, and, as against him, Jagannath had a good title to the property.

(1) (1887) I. L. R. 14 Cal. 484.

(2) (1894) I. L. R. 21 Cal. 989.

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In the meantime, the decree obtained by the plaintiff against Jaharmal was set aside (on the 10th December 1895) by the High Court, on appeal, and his suit was dismissed. Thereupon, Jaharmal applied, under section 583 of the Code, for refund of Rs. 3,000 which was paid ostensibly by Ram Chandra for the auction-price of Jaharmal's property. Jaharmal's application was successful, the plaintiff's objection to it having been disallowed by all the Courts. The execution proceedings were subsequently struck off for default. In 1902 Jaharmal again applied for recovery of Rs. 3,000 from the plaintiff, and again the plaintiff was unsuccessful in his opposition.

The present suit was commenced, on the 20th June 1902, for a declaration that Jaharmal had no saleable interest in the property for which the plaintiff had paid Rs. 3,000 in the *benami* name of Ram Chandra, and that Jaharmal was not entitled to levy execution for Rs. 3,000.

Assuming that Ram Chandra was merely plaintiff's *benamidar*, the sale of Jaharmal's property became inoperative when the decree, under which the sale had taken place, was set aside on appeal. The sale became void as against Jaharmal, and he was entitled to be placed in the same position as if the sale had not taken place. He was entitled under section 583 of the Code to have the property back and not the sale-proceeds. The reversal of the decree carried with it the reversal of the sale.

It is equally clear to us that if Jagannath had obtained a good title to the property, by a conveyance from Jaharmal executed before the attachment, Jaharmal had no saleable interest at the date of sale, and the purchaser was entitled to a refund of the purchase-money. Jaharmal could not ask for restitution of either the property or the purchase-money, because he had neither title nor possession when possession was delivered to Ram Chandra, and there was nothing of which he could ask for restoration, and because he had no such title or interest which was sold so as to justify a refund of the purchase-money. Section 583 is clear in its terms.

The judgments in the previous proceedings regarding the property, between Ram Chandra and Jagannath, would seem to indicate that Ram Chandra was a *benamidar* of the plaintiff and,

also, that Jaharmal had no saleable interest at the date of sale. But Jabarmal was not bound by them, though they might be admissible as evidence, and he could, as he has done in the present case, question the findings arrived at in the previous proceedings on these points. There is no distinct finding in the judgments of the lower Courts, in the case now under appeal, on either of the points, and if there be no legal bar to the suit, the case must be remanded for findings of necessary facts and for a fresh decision.

The lower Courts have, however, held that the provisions of section 244 of the Code stand in the way of the suit. The argument before us on behalf of the defendants respondents, the sons of Jaharmal who died during the pendency of the suit, is that the decisions arrived at in the proceedings instituted by Jaharmal, under section 583, for refund of Rs. 3,000 constitute a bar to the maintenance of the suit, and that the plaintiff could resist the claim of Jaharmal in those proceedings only and not by means of a suit. The argument assumes that section 244 applies in its entirety to proceedings had under section 583 for restitution of property taken in execution of a decree which is reversed in appeal.

Section 583 does not expressly refer to section 244. All that it says is that the Court shall proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in suits. It does not appear to us that the provision in section 244, that the questions referred to in that section must be determined by the order of the Court executing the decree *and not by separate suit*, is made applicable to proceedings for restitution by the terms of section 583.

In *Shama Parshad Roy Chowdhury v. Hurro Parshad Roy Chowdhury*(1), Lord Justice Turner, in delivering the judgment of the Judicial Committee, observed:—"There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that is otherwise in India,—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law

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rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action."

In *Huro Chunder Roy Chowdhry v. Shoorodhoney Datta*(1), a suit was allowed for restitution of the profits recovered by a decree-holder whose decree for possession was set aside on appeal. To the same effect is the case of *Shurnomoyee v. Pattarri Sirkar*(2). The case of *Jamini Nath Roy v. Dharma Das Sur*(3), cited before us, does not lay down any contrary rule of law.

We are, therefore, of opinion that there was no bar to the institution of the present suit. The lower Courts should have decided the questions of fact raised in the suit and come to a decision as to the right of the plaintiff to the reliefs sought for.

We, accordingly, remand the case to the lower Appellate Court for dealing with it on the merits. Evidence must be gone into if the parties were precluded from adducing evidence, and the lower Appellate Court may send back the case for this purpose to the Court of first instance. Costs of this appeal will abide the result.

*Appeal allowed; case remanded.*

S. C. G.

(1) (1868) 9 W. R. 402.

(2) (1878) I. L. R. 4 Calc. 625.

(3) (1906) I. L. R. 33 Calc. 857.