

MANU/BH/0180/1925

Equivalent Citation: AIR1925Pat482, 87Ind. Cas.743

IN THE HIGH COURT OF PATNA

Decided On: 13.03.1925

Appellants:**Shaikh Kaloo**
Vs.

Respondent:**Bholanath and Ors.**

Hon'ble Judges/Coram:

B.K. Mullick, Robert Lindsay Ross and Das, JJ.

JUDGMENT

B.K. Mullick, J.

1. This appeal arises out of an order made by the District Judge of Gaya on the 8th of July, 1924, allowing an appeal from the decision of the Munsif of Gaya dated the 12th of May, 1924. It appears that Bholanath and another got a decree for money against Musammatt Wasihan and Toolia and in execution attached two houses in the town of Gaya alleging that they were the properties of the above judgment-debtors. An objection was then preferred purporting to be made under Section 47 of the Civil Procedure Code by the appellant Kaloo who alleged that the houses were his properties and did not belong to Wasihan and Toolia.

2. The Munsif allowed the application and withdrew the attachment whereupon the decree-holder appealed to the District Judge who set aside the Munsif's order and found that the properties belonged to the judgment-debtors and that they were liable to be sold.

3. The present second appeal is preferred by the defendant Kaloo who urges that no appeal lay to the District Judge as the decision of the Munsif was one under Order 21, Rule 58 of the Civil Procedure Code and that the only remedy open to the decree-holder was to institute a regular suit. The appellant has also, by way of precaution, filed a petition in revision which has been marked as Civil Revision Case No. 322 of 1924.

4. The sole question argued before us is whether the appellant was entitled to come in under Section 47 of the Civil Procedure Code. The learned Vakil for the appellant urges that though the appellant was impleaded as a defendant in the original suit in which the money decree was made, eventually the suit was dismissed against him; and that although his name appears among both the parties to the suit in the decree, he was in fact not affected by the decree and was not party within the meaning of Section 47. On this point, there was some conflict of opinion in the various Courts before the present Civil Procedure Code was enacted. It was held, for instance, in Sheo Pargash Singh v. Nawab Singh (1910) 32 All. 321 that Section 244 of the Code of Civil Procedure of 1882 does not apply to a dispute between the decree-holder and a person against whom though a party to the suit, no decree has been passed. The general principle upon which this decision and others of a similar kind were based was that it was not fair that a person against whom no decree had been made and who was really in the position of a stranger, should be compelled to have resort to

the summary procedure of the Execution Court in order to establish his title. That principle, however, has not been accepted in Section 47 of the present Code of Civil Procedure of 1908, which has expressly enacted that the parties to the suit include the parties against whom the suit has been dismissed. Therefore, upon the plain wording of the statute there can be no room for argument as to whether the appellant was entitled under Section 47 of the Code, to apply to the execution Court for the determination of his claim; and as the decision of Execution Court was a final decision on a question of right, it was a decree and an appeal lay against it to the District Judge. Therefore the objection that the District Judge had no jurisdiction to entertain the appeal against the Munsif's order fails. The Munsif also does not appear to have treated the application of Kaloo as one under Order 21, Rule 58, C.P.C., and, even if he had done so, the objection that an appeal did not lie would not have been entertainable if in fact that application was one entertainable under Section 47 of the Code.

5. A second appeal therefore would have lain to this Court against the order of the District Judge, if the matter had not been concluded by a finding of fact. The District Judge finds that the attached property was the property of the judgment-debtors and that finding is final in second appeal. The second appeal therefore fails and it is dismissed with costs.

6. Civil Revision No. 322 of 1924 is not pressed and the application is dismissed. There will be no separate coats in the Revision.

Das, J.

7. I agree.

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