

(1921) 03 PAT CK 0007
In the Patna High Court

Choudhury Jagdish Missir

APPELLANT

Vs

Choudhury Sureshwar Missir and Others

RESPONDENT

Date of Decision : 10-03-1921

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2, 47

Citation : AIR 1921 Patna 107 : 62 Ind. Cas. 608

Hon'ble Judges : Ross, J;Das, J

Bench : Division Bench

Judgement

Das J.

1. The preliminary objection must, in my opinion, be overruled. The objection is this: the alleged compromise having been arrived at between the parties in a proceeding in executions, the provisions of Order XXII, Rule 4, must operate so as to take away from the Court the power to record the compromise and to pass a decree in accordance therewith. Order XXIII, Rule 4, no doubt, provides that nothing in Order XXIII shall apply to any proceedings in execution of a decree or order, the reason, of course, being that Order XXI, Rule 2, and Section 47 taken together provide a complete procedure for recording compromises arrived at in execution proceedings. Order XXIII, Rule 3, gives the Court power to record the terms of settlement where it is proved to its satisfaction that a suit has been adjusted wholly or in part by any lawful agreement or compromise. Now the term "suit" has not been used in the CPC in its narrow sense as being terminated by the decree made by the first Court, but in a broad sense, as including not only the stages of a suit to its termination by the decree of the first Court but as including its appellate stage and proceedings in execution of the decree made in the suit. A "suit" is a process for the recovery of a right or claim, and, from this point of view, an application for setting aside a sale under Order XXI, Rule 90 of the Code, is a suit or a proceeding in the suit within the meaning of Order XXIII, Rule 3. But is it a proceeding in execution of a decree? For if it be a proceeding in execution of a decree, the jurisdiction of this court is clearly ousted by Order

XXIII, Rule 4.

2. In my opinion, a proceeding to set aside a sale under Order XXI, Rule 90, is not a proceeding in execution, As I have said before Order XXI, Rule 2, read with Section 47, and Order XXIII, Rule 3, contain the whole procedure by which compromises may be recorded. If the matter falls within Order XXI, Rule 2, read with Section 47, Order XXIII, Rule 3, can have no operation, but if it does not fall within the provision, then, Order XXIII, Rule 4, not applying, Order XXIII, Rule 3, must operate, The critical question for our determination, therefore, is, can an application under Order XXI, Rule 90, be regarded as an application u/s 47? In my view, under the present code it cannot, and, the simplest of reasons may be given in support of this view. If an application under Order XXI, Rule 90, were an application u/s 47, then the order would operate as a decree u/s 2 of the code and be appealable as such. But as a matter of fact under the old code, no appeal lay from an order passed u/s 311 of the code which corresponds with Order XXI, Rule 90, and, under the present code, the order is appealable as an order under Order XLIII, Rule 1, Clause (1). The fact that the Legislature has given an express right of appeal under Order XLIII, Rule 1, Clause (1), suggests an inference that they did not regard an order under Order XXI, Rule 93, as an order u/s 47. In my view, therefore, a compromise in a proceeding under Order XXI, Rule 90, could not have been recorded under Order XXI, Rule 2, read with Section 47 of the code. That being so, it can be recorded under Order XXIII, Rule 3.

3. Nor do I see how a proceeding for setting aside a sale can (quite apart from this consideration) be regarded as a proceeding in execution. Such a proceeding may eventually result in the execution proceedings being re-opened, but, in my view, it cannot be regarded as a proceeding in execution, Execution proceedings ordinarily end with sale, which results in the satisfaction or part satisfaction of the decree. I think the Full Bench decision of this court in *Abdul Gani v, Raja Ram* 35 Ind. Cas. 468 : 1 P.L.J. 232 : 3 P.L.W. 62 : 20 C.W.N. 829 supports this conclusion. I would overrule the preliminary objection.

4. Coming now to the merits, we think it undesirable to decide the matter on affidavits. It is obvious then an enquiry must be held into the question whether the matter has been adjusted wholly in part by any lawful agreement between the parties, and we think it right to hold the enquiry ourselves. The matter must be placed before us for final disposal on the 30th March next and it must be distinctly understood that no adjournment will be granted. The parties must be ready to produce their evidence on that day.

Ross, J.

5. I agree.