

A. I. R. 1921 Lahore 156 (1).

BROADWAY AND WILBERFORCE, JJ.

Mst. Shankri—Defendant-Appellant
v.*Jodha*—Plaintiff-Respondent.

Second Appeal No. 457 of 1918, decided on 12th May, 1921, from the decree of the Dist. J., Hoshiarpur, dated 2nd November, 1917.

Specific Relief Act (1887), S. 42—Plaintiff in joint possession of suit land with defendant—Mere declaratory suit does not lie.

Where plaintiff's contention is that defendant is not entitled to retain possession of the suit land, the fact that he is in joint possession of a greater portion of the land with the defendant does not entitle him to bring a declaratory suit. He can and should sue for exclusive possession.

[P. 156, C. 1.]

Dev Raj Sawhney—for Appellant.*B. D. Qureshi*—for Respondent.

Broadway, J.:—In the suit giving rise to this appeal *Jodha* son of *Wazira*, sought to obtain a declaration to the effect that, owing to her unchastity the defendant, *Mt. Shankri*, widow of *Newan* had lost her life estate in 187 *kanals* 2 *marlas* of land, and therefore was not entitled to retain possession thereof. The Courts below have held that the plaintiff being in joint possession was entitled to bring a declaratory suit. They also held that the defendant had become unchaste and the plaintiff was awarded a decree for the declaration prayed for.

Mt. Shankri has now come up to this Court in Second appeal through *Mr. Dev Raj Sawhney*, and it has been contended that the appellant is in sole possession of about 23 *kanals* of the land in suit and in joint possession of the rest. On the authority of *Abdul Ghafur v. Mehar-un-Nissa* (1), *Mr. Dev Raj* contended that the suit for a declaration did not lie. In this view we agree. The plaintiff who is in joint possession of a greater portion of this land could and should sue for exclusive possession if his allegations as to *Mt. Shankri's* unchastity are correct. It is clear that the object of his suit is to dispossess *Mt. Shankri* of the land of which she is in sole possession and that of which she is in joint possession with him. *Mr. Kureshi* on behalf of the respondent urged that he should be allowed to amend his plaint at

(1) (1909) 101 P. R. 1909=4 I. C. 856.

this stage. As however this point was raised by the defendant from the very outset we do not think we would be justified in allowing the amendment prayed for at this late stage of the proceedings. We would note that the judgment of the learned District Judge is unsatisfactory inasmuch as neither of the points raised before him have been discussed. He appears to have accepted the conclusions arrived at by the trial Court without any independent examination of the evidence or the law.

The appeal is accepted and the suit dismissed with costs throughout.

Appeal accepted.

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SCOTT-SMITH, J.

Mst. Gul Bano and others—Judgment-Debtors-Appellants

v.

Muhammad Zakar Khan and others—Decree-holders-Respondents.

Misc. Second Appeal No. 2069 of 1919, decided on 29th March, 1921, from the order of the Dist. J., Multan, dated 27th June 1919.

(a) *Civil P. C., O. 43, R. 1 (j)*—Order under—No second appeal lies—*Civil P. C. S. 104 (2)*.

No second appeal lies from an order under O. 43, R. 1 (j).

(b) *Civil P. C., S. 100*—Lower Appellate Court having no jurisdiction is no ground for second appeal when such second appeal is disallowed by *Civil P. C.*

No second appeal lies merely because the lower appellate Court had no jurisdiction to hear the appeal, when the *Civil P. C.* does not allow such second appeal. [P. 157, C. 1.]

(c) *Civil P. C., O. 21, R. 92*—Sale set aside—No notice given to auction purchaser—Aggrieved party can appeal—*Civil P. C., O. 43, R. 1 (j)*.

An execution sale cannot be set aside without notice to the auction-purchaser, and if the original Court has passed an order adverse to the interest of the auction-purchaser, he is entitled to appeal and test the legality of the order in the superior tribunal. [P. 157, C. 1.]

Shah Nawaz—for Appellant.*Muhammad Iqbal and Tirath Ram*—for Respondents.

Judgment :—A sale in execution of the decree passed against Nur Mustafa appellant was set aside on the 13th February, 1919 with the consent of the pleaders for the decree-holder and the judgment-debtor. From this order the auction-purchaser appealed to the District Judge who reversed the order of the executing Court holding that there was no legal ground for setting aside the sale which he accordingly confirmed.

From this order the judgment-debtor has filed a second appeal to this Court and Dr. Muhammad Iqbal, Advocate for the auction-purchaser and Lala Tirth Ram, Vakil, for the mortgagee of the property sold raise a preliminary objection that no second appeal lies from an order under Order XLIII, rule 1 (j), in accordance with sub-clause (2) of Section 104, of the Civil Procedure Code. In support of this objection *Jiwan Singh v. Sawan Mal* (1) and *Rakhal Chandra v. Manaranjan* (2) are cited. Mr. Shah Nawaz on behalf of the appellant says that the auction-purchaser was no party to the proceedings in the executing court and therefore had no *locus standi* to appeal to the District Judge, and that the latter officer had no jurisdiction to hear the appeal lodged in his Court and that this fact alone gives the judgment-debtor a right of second appeal. He is, however, unable to cite any authority in support of this proposition. He admits that if the District Judge had jurisdiction to hear the appeal then no second appeal lies. If the District Judge had no jurisdiction that might be a good ground for asking this Court to interfere on the revision side, but it certainly does not give the aggrieved party a right of second appeal, which is not allowed by the Code of Civil Procedure.

Dr. Muhammad Iqbal referred to a judgment of a Division Bench of the Calcutta High Court, *Bibi Sharifan v. Mahmood Habbibuddin* (3), wherein it was held that an execution sale cannot be set aside without notice to the auction-purchaser, and that if the original Court has passed an order adverse to the interest of the auction-purchaser, he is entitled to appeal

(1) (1919) 168 P. R. 1919=54 I. C. 941.

(2) (1917) 41 I. C. 753.

(3) (1911) 15 C. W. N. 685=10 I. C., 148=13 C. L. J. 535.

and test the legality of the order in the superior tribunal.

I accordingly hold that no second appeal lies and I dismiss the appeal with costs. I am also of opinion that there is no ground for interfering on the revision side which moreover I have not been asked to do.

Appeal dismissed.

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SHADI LAL, C. J. AND LESLIE JONES, J.
Manji—Appellant

v.

Ghulam Muhammad and others—Respondents.

Letters Patent Appeal No. 59 of 1919, decided on 22nd November, 1920, from the decree of Abdul Raoof, J., dated 19th November, 1919, in Civil Appeal No. 772 of 1919.

(a) *Jurisdiction—Revenue authorities have no jurisdiction to partition an abadi land.*

Revenue authorities have jurisdiction to effect a partition of only the agricultural land and have no such jurisdiction with respect to an *abadi* land.

[P. 158, C. 2.]

(b) *Co-sharers—Joint possession—Exclusive title of co-sharer—Proprietors not established—Joint possession of land when proved to be the property of all co-sharers, can be obtained.*

When one co-sharer occupies a portion of the vacant land, which in many villages has already been reduced to a comparatively small area, hardly sufficient for the common purposes of the inhabitants of the village, it is hardly fair to the other co-sharers to say to them that their action for the joint possession of the common land so occupied cannot be sustained, because they have remedy by partition, and that the co-sharer occupying the land must, until partition, remain in exclusive possession of the land occupied by him.

[P. 159, C. 1.]

Where plaintiffs have not succeeded in establishing the exclusive title of the co-sharers who are proprietors in the patti, they cannot get a decree for ejection, but there is nothing to prevent them from obtaining a decree for joint possession of the land which is proved to be the property of all the co-sharers including the plaintiffs and the defendants. [18 Cal. 10 P. C. Dist.]

Quære. Whether the doctrine that a co-sharer occupying a portion of the joint land, who has not denied the joint character of the property, should be allowed to retain it until partition, is applicable to the peculiar circumstances of the *abadi* land more especially when the vacant land has already been reduced to a minimum area