

had every reason to leave her husband's house and stay away from him, and the Court will not assist the husband in forcing her to live under such conditions.

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Grover, J.

For all these reasons the appeal is allowed and the petition of the husband for restitution is hereby dismissed. In the circumstances of the case, however, there will be no order as to costs.

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LETTERS PATENT APPEAL

Before Bhandari, C. J., and Dulat, J.

HUKAM CHAND,—*Defendant-Appellant*

versus

HARISH CHANDER,—*Plaintiff-Respondent*

Letters Patent Appeal No. 86 of 1955

The Partition Act (IV of 1893)—Section 7—Order dismissing objections to a sale held under—Whether appealable—“Procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees”—Meaning of.

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Held, that when objections to the sale held under the provisions of the Partition Act, 1893, are dismissed and a final decree is passed then an appeal lies against the final decree and not against the order dismissing the objections as an order under section 47 of the Code of Civil Procedure. The Partition Act does not declare expressly or by necessary implication that a person who is dissatisfied with an order declining to set aside a sale under the Partition Act shall have the same rights of appeal as have been conferred upon a person who is dissatisfied with an order declining to set aside a sale in the execution of a decree.

Held, that the words “procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees” in Section 7 of the Partition Act mean that, as

far as practicable, the same procedure shall be followed in respect of sales under the Partition Act as has been prescribed in the Code of Civil Procedure in respect of sales in execution of decrees. It does not convert the sale proceedings in the suit into execution proceedings under the Code of Civil Procedure and does not make the proceedings in the suit proceedings in execution.

Letters Patent Appeal under clause X of the Letters Patent against the Judgment of Hon'ble Mr. Justice Bishan Narain, passed in E. S. A. No. 927 of 1954, on 24th March, 1955, dismissing the appeal relating to the objection to sale but accepting the appeal relating to mesne profits and remanding the appeal to the lower appellate Court for decision of the mesne profits according to Law.

The lower appellate Court (Shri D. R. Pahwa, Additional District Judge, Gurgaon), had affirmed the order of Shri Banwari Lal, Sub-Judge, 1st Class, Palwal, dated 19th December, 1953,—vide his order, dated 12th May, 1954.

ROOP CHAND, for Appellant.

D. N. AGGARWAL, for Respondent.

JUDGMENT

Bhandari, C. J. BHANDARI, C. J.—This appeal raises the question whether an appeal lies from an order dismissing objections to a sale held under the provisions of the Partition Act.

On the 27th February, 1952, Harish Chandar brought a suit against his brother Hukam Chand for possession by partition of a shop situate in Palwal and for the recovery of mesne profits in respect of that shop. A preliminary decree was granted on the 30th January, 1953, but no appeal was preferred from that decree. Proceedings were taken for partition of the property by metes and bounds, and in the course of these proceedings the parties agreed that the shop should be sold

and that the proceeds of the sale should be distributed between the co-sharers. The shop was sold in due course for a sum of Rs. 4,300 and the local commissioner submitted a report in respect of the mesne profits. Hukam Chand objected to the sale and to the mesne profits awarded by the local commissioner. The Court overruled the objections, passed final decree for possession of the entire suit property in favour of the plaintiff, directed the commissioner to pay a sum of Rs 2,150 less half commission of the sale to the defendant as his share in the suit property, and directed the defendant to pay a sum of Rs. 270 as mesne profits to the plaintiff.

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The defendant was dissatisfied with the order of the trial court and preferred an appeal to the Additional District Judge at Gurgoan, but the learned Additional District Judge dismissed the appeal on the ground that the appeal was not properly stamped. When a second appeal was preferred to this Court, a learned Single Judge of this Court held that full *ad valorem* court-fee had been paid on the claim in respect of mesne profits, that sale proceedings under the Partition Act are proceedings in the suit and not proceedings in execution, that an appeal from an order of sale passed under the Partition Act is not an appeal under section 47 of the Code of Civil Procedure, and that the court-fee on the appeal against the sale was not sufficient. In this view of the case the learned Single Judge allowed the appeal relating to mesne profits and remanded the case to the lower appellate Court for decision of the appeal on the question of mesne profits only. The rest of the appeal was dismissed. The defendant is dissatisfied with the order and has preferred an appeal under clause 10 of the Letters Patent.

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It is common ground that sale was ordered in the course of proceedings under the Indian Partition Act, that the Subordinate Judge dismissed the objections taken by the defendant in regard to the sale of the property and to the award of Rs. 270 by way of mesne profits, that the appeal has been preferred from the order, dated 19th December, 1953, by which the objections were dismissed, and that no appeal was filed from the preliminary decree which was passed on the 30th January, 1953, or from the final decree which was passed on a later date.

Section 7 of the Indian Partition Act is in the following terms:—

“7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely—

- (a) If the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;
- (b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.”

It is not disputed that this Court has not prescribed any procedure for the sale of property under the provisions of the Partition Act, and consequently that the Court was under an obligation to follow the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees. Mr. Rup Chand, who appears for the defendant, contends that his client had made an application for the setting aside of the sale on the ground of material irregularity or fraud in publishing or conducting it, and that as this application was disallowed under the provisions of Order 21, rule 92, of the Code of Civil Procedure, his client became entitled to prefer an appeal under the provisions of Order 43, rule 1(j) of the Code of Civil Procedure. Three decisions have been cited in support of this proposition. In *Labhu Ram v. Ram Gopal and others* (1), Johnstone, J., held that as defendants are entitled to prefer objections to a sale held under the provisions of section 7 of the Partition Act just as in the execution proceedings, an appeal lies against the decision on such objections. In *K. Kandaswami and another v. K. K. Neelamagam Pillai* (2), it was held that although a right of appeal must be given by an express enactment, but if by virtue of a special enactment an order of a particular tribunal is to be treated as an order of a regular Court for certain purposes, then the right of appeal is attracted under the general law. Thus, even though no right of appeal is expressly conferred under the Madras House Rent Control Order which provides that the order made by the Rent Controller is final, yet as section 7A(2A) of that Order provides that an order of the Rent Controller sought to be executed before the Subordinate Judge is to be treated as if

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(1) A.I.R. 1929 Lah. 245.
(2) A.I.R. 1947 Mad. 112.

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it were a decree of his court, then section 47, Civil Procedure Code, becomes applicable and the parties are entitled to an appeal from an order of an executing Court though the order of the Rent Controller directing eviction is final and cannot be challenged in the civil Court. In *Hans Raj Salig Ram v. L. Niranjan Lal* (1). A Division Bench of this Court held that where a matter is made disposable by the ordinary civil Courts, all the incidents of the ordinary procedure of civil Courts shall attach to the disposal of that matter, and those incidents of ordinary procedure will, if necessary, include rights of appeal.

The question whether an appeal does or does not lie from an order declining to set aside a sale conducted under the provisions of the Partition Act must obviously be determined by the language which the legislature has chosen to employ. The legislature states quite clearly that the procedure shall be such as is "prescribed in the Code of Civil Procedure in respect of sales in execution of decrees." It declares in substance that, as far as practicable, the same procedure shall be followed in respect of sales under the Partition Act as has been prescribed in the Code of Civil Procedure in respect of sales in execution of decrees. It does not convert the sale proceedings in the suit into execution proceedings under the Code of Civil Procedure and does not make the proceedings in the suit proceedings in execution. An appeal is a creature of the statute and it is for the legislature to declare in what cases, under what circumstances and from what Courts appeals may be taken. Unless the statute expressly or by necessary implication makes provision therefor, there is no right of appeal. The Partition Act does not

(1) A.I.R. 1952 Punjab 159.

declare expressly or by necessary implication that a person who is dissatisfied with an order declining to set aside a sale under the Partition Act shall have the same rights of appeal as have been conferred upon a person who is dissatisfied with an order declining to set aside a sale in the execution of a decree. I am unable to discover anything in the language of section 7 of the Partition Act which would justify me in holding that a person aggrieved by an order declining to set aside a sale under the Partition Act has a right to prefer an appeal under rule 1 of Order 43 of the Code of Civil Procedure.

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It is true that a Single Judge of the Lahore High Court took a contrary view in *Labhu Ram v. Ram Gopal and others* (1), but it is significant that he did not care to give the reasons on which his view is based. The other two cases on which reliance has been placed by Mr. Rup Chand are not strictly relevant. I am inclined to concur in the view taken by Bishan Narain, J., that when objections to the sale are dismissed and a final decree is passed, then an appeal lies against the final decree and not against the order dismissing the objections as an order under section 47, Civil Procedure Code.

For these reasons I am of the opinion that no appeal lay from an order, dated the 19th December, 1953, and that the present appeal must be dismissed with costs. I would order accordingly.

DULAT, J.—I agree.

Dulat, J.

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(1) A.I.R. 1929 Lah. 245.