
(1951) 12 BOM CK 0004
In the Bombay High Court
Case No : Second Appeal No. 1228 of 1948

Lakhu Motiram and Others	Vs	APPELLANT
Radhabai Mulchand Ramnarayan		RESPONDENT

Date of Decision : 18-12-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92(3), 47, 47(1)

Citation : AIR 1952 Bom 438 : (1952) 54 BOMLR 483 : (1953) ILR (Bom) 1056

Hon'ble Judges : Chainani, J; Bhagwati, J

Bench : Division Bench

Advocate : M.M. Virkar, for the Appellant; G.S. Gupte, for R.B. Kotwal, for the Respondent

Judgement

Chainani, J.

[1] The facts of the suit, from which this appeal arises, are briefly these. One Lalji Gokul executed a mortgage deed on 9-9-1914, mortgaging S.No. 49 Pot No. 3 and Falni No. 1 and S.No. 61, Pot. No. 2 and Falni Nos. 1, 2 and 3 of the village of Khadepi in Mahad taluka and some other lands to Bam Narayan, the father of the defendant's husband. At that time pot numbers were given to paddy lands and falni numbers to varkas lands growing grass. On 18-5-1925, Lalji Gokul sold some of the mortgaged properties as well as S.No. 49, pot Nos. 1 and 2 and S.No. 61 Pot No. 1, which were not covered by the mortgage in favour of Ram Narayan, to Lakhu Motiram, plaintiff 1, and Ranchhod Mathur, whose heirs are plaintiffs 2, 3 and 4. In 1925 Ram Narayan filed a suit against Lalji Gokul in order to recover the amount due to him. Plaintiff 1 and Ranchhod Mathur were made parties to the suit as subsequent purchasers of some of the mortgaged properties.

In January 1927 a decree was passed in that suit directing that the mortgage amount should be recovered by the sale of the mortgaged properties. The decree mentioned the same lands as were mentioned in the mortgage-deed. Thereafter the lands were re-surveyed. The pot and falni numbers were abolished and pot

hissa numbers were given to the portions of survey numbers. In 1931 Ram Narayan filed a darkhast for recovering the amount due to him by sale of the mortgaged properties. He included therein S.No. 49 and S.No. 61, Pot-hissa No. 1. The new S.No. 49 was made up of old pot Nos. 1 to 3 and Falni Nos. 1 and 2, while the new S. No. 61/1 consisted of old pot Nos. 1 and 2, Falni No. 2 and part of Falni No. 3. Out of these Pot Nos. 1 and 2 of S.No. 49 and Pot No. 1 of S.No. 61 were not included in the mortgage-deed. The lands, for the sale of which Ram Narayan had made an application, therefore, included some lands, which were not covered by the mortgage-deed or the decree obtained by Ram Narayan. These lands were mentioned in the proclamation of sale without any objection from the plaintiffs and were subsequently sold. Ram Narayan died during the pendency of the execution proceedings and his son Mulchand, the husband of the present defendant, and his widow Jamnabai were, brought on record as his legal representatives. The lands were purchased by Mulchand and a certificate of sale was issued to him on 11-3-1942. On 27-5-1942, the auction purchaser, Mulchand, obtained possession of the properties. Over four years later on 1-10-1946, the plaintiffs filed the present suit against the defendant, as heir of Mulchand, who had died in the meantime. They alleged in the plaint that portions of S.No. 49 and S.No. 61/1 were not covered by the mortgage-deed or by the mortgage-decree obtained by Ram Narayan, that they had been wrongly sold in execution of that decree and that the auction purchaser had acquired no title to them by his purchase at the court-sale. The plaintiffs, therefore, prayed for possession of these pieces of lands being awarded to them. The defendant contended that the suit was barred u/s 47, Civil P. C.

This contention was not accepted by the trial Court. That Court held that the plaintiffs had proved their title to the suit lands by the sale-deed executed in their favour by Lalji Gokul in 1925, that the sale of these lands at the court-sale was not legally valid and that the auction purchaser had acquired no interest in them, as he was not entitled to get any more property than what was ordered to be sold by the mortgage-decree. The trial Court, therefore, passed a decree directing the defendant to hand over possession of the suit lands to the plaintiffs. The plaintiffs appealed. The learned District Judge, who heard the appeal, came to the conclusion that the suit was barred u/s 47, Civil P. C. He, therefore, reversed the decree passed by the trial Court and dismissed the plaintiff's suit with costs throughout. Against his decision, the plaintiffs have come in second appeal.

[2] The plaintiffs in this suit seek to recover possession of the properties sold at a court-sale from their purchaser. Such a suit cannot lie, until the sale has been set aside, unless the sale could be considered to be a nullity, see Nagabhatta v. Nagappa 46 Bom. 914. It has been urged that as the mortgage decree obtained by Ram Narayan directed the sale of the mortgaged properties only, the executing Court had no jurisdiction to sell the suit properties, which were not included in the mortgage, and that consequently the sale of these properties was a nullity. The properties were described in the mortgage-deed and in the decree

by reference to their pot and falni numbers. These pot and falni Nos. were abolished before Ram Narayan filed the darkhast for executing the decree. The executing Court had, therefore, to determine what properties were covered by the decree by reference to their new survey and pot-hissa numbers. In furnishing the new description of the mortgaged properties, the decree-holder Ram Narayan evidently by mistake, included the suit properties also. The original mortgagor Lalji Gokul or the plaintiffs, who had purchased Lalji Gokul's interest in the properties did not object to the new description of the mortgaged properties given by Ram Narayan. The Court, therefore, ordered their sale, acting evidently on the assumption that these properties were also included in the decree. It is, therefore, in our opinion, difficult to hold that the sale of these properties was a nullity. In *Nagabhatta v. Nagappa* a property not covered by the mortgage was through mistake of the mortgagor himself included in the decree and sold in execution of that decree. In a suit brought by the plaintiff for recovering possession of that property, it was held that its sale was not a nullity. In his judgment *Maeleod C.J.* relied on the following observations of the Privy Council in *Malkarjan v. Narhari* 25 Bom. 337 (p. C.) (347):

"Although the Court made a mistake, "a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed"..... Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the facts, and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a court-sale would be sale. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do."

[3] In this case the decree-holder in his application for execution described the mortgaged properties by reference to their new survey numbers and pot-hissa numbers. No objection to this description was taken by the plaintiffs or the original mortgagor. The executing Court was, therefore, entitled to come to the conclusion that the description given by the decree-holder in the darkhast application was correct and that all the properties mentioned therein were liable to sale. In ordering their sale, the Court cannot, therefore, be said to have acted without jurisdiction, for it had jurisdiction to decide what properties were liable to sale. In our opinion, therefore, the sale in this case was not a nullity. It was a case of a material irregularity in publishing and conducting the sale. The remedy of the plaintiffs was, therefore, to apply under Order 21, Rule 90, Civil P.C., for setting aside the sale. Sub-rule (1) of Rule 92 provides that where no application is made for setting aside the sale, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. Sub-rule (3) of this rule provides that no suit to set aside an order made under this rule shall be brought by any person against whom such an order is made.

[4] In *Damodar v. Vinayak* 26 Bom. 40 it has been held that where an order

confirming the sale has been made, it is an order against the judgment-debtor, even though he has made no application to set it aside, and that a suit brought by a judgment-debtor to set aside the sale is not maintainable. See also *Brahmayya v. Appayya Sastri* 44 Mad. 351 and *Gajrajmati Teorain v. Akbar Husain* 29 ALL. 196 (P.C.).

[5] 18th December. In this case no application was made by the plaintiffs or the mortgagor to set aside the sale. If, therefore, it is held that it is a case of a material irregularity in publishing and conducting the sale, the suit will be barred under Order 21, Rule 92 (3), Civil P.C. The Allahabad High Court has also held in *Imtiaz-unnissa v. Chuttan Lal*, 47 ALL. 304 that a suit brought by a judgment-debtor to recover possession of the property on the ground that it was wrongly proclaimed for sale and sold, as it was riot covered by the decree, is barred by Order 21, Rule 92, Civil P.C.: see also *Rahim Bakhsh v. Kishen Lal* ILR (1939) ALL. 335.

[6] We shall now discuss what the legal position would be, if the sale of the suit lands is regarded as a nullity, as has been contended by Mr. Virkar on behalf of the appellants-plaintiffs, relying on the decision of Dixit J. in *Ram Ganu v. Hari Sambhu*, 52 Bom. L.B. 353. Even then an application could have been made to the executing Court to set aside the sale on the ground that the suit properties were not liable to be sold in execution of the mortgage decree and that the sale was, therefore, void. Such an application, falls u/s 47, Civil P.C. The question then arises whether the present suit is barred by Section 47, Sub-section (1) of which states that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. The object of this section is to check needless litigation and to provide a cheap and expeditious procedure for the determination of questions relating to execution without recourse to a separate suit. In *Wahed Ali v. Mt. Jumaee*, 11 Beng. L.R. 149 the Privy Council referring to the corresponding section of the Act of 1861 observed (p. 155) :

"... This enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation. "

The same point was stressed by the Privy Council in *Prosunno Coomar Sanyal v. Kali Das Sanyal* 19 Ind. App. 1G6 (P.C.), where their Lordships observed (p. 169):

" It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of Section 244 (which corresponds to present Section 47)."

Section 47, Civil P.C., should, therefore, be construed liberally.

[7] In order to make this section applicable, two conditions must be fulfilled. The

question must relate to the execution, discharge, or satisfaction of the decree and it must be one arising between the parties to the suit in which the decree was passed or their representatives. In the present case the first condition is satisfied, for there can be no doubt that the question whether the suit properties were or were not liable to be sold in execution of the decree obtained by the mortgagee Ram Narayan was one relating to the execution, discharge or satisfaction of that decree.

[8] The next question to be considered is whether this question arises between the parties to the suit in which the decree was passed or their representatives. Except in *Sadashiv v. Narayan*, 35 Bom. 452 our Court has consistently taken the view that a stranger auction purchaser is not a representative of either the judgment-debtor or the decree-holder. I would only refer to some of the cases on this point: *Vishvanath Charu Naik v. Subraya Shivapa Shetti*, 15 Bom. 290, *Narsinbhat v. Bandit*, 20 Bom. L.R. 495, *Hargovind, Fulchand v. Bhudar Raoji*, 43 Bom. 550 (F. B.) and *Hanmantagouda Nayangouda v. Shivappa, Dundappa*, 42 Bom. L.R. 1123. The observations made in some of these cases are wide enough to apply even in those cases, in which the auction purchaser is the decree-holder himself. Thus, in *Gangadhar Dhanjishet v. Balwant Kashirao*, ILR (1940) Bom. 370, *Broomfield J.* has observed (p. 382):

"....so far as Bombay is concerned, there can be DO doubt that the view which is binding upon us is that an auction-purchaser is neither a party within the meaning of that section (Section 47), nor does he represent either the judgment-creditor or the judgment-debtor. "

It has, therefore, been contended that as the present suit is for recovering possession of the suit properties from the auction purchaser, who, according to the Bombay view, is not a representative of either the judgment-debtor or the judgment-creditor, the question is not between the parties to the suit in which the decree was passed or their representatives and that Section 47 has, therefore, no application. We are unable to accept this contention. The words "all questions arising" used in Section 47 do not mean only such questions as are actually raised in the execution proceedings, or otherwise a party by not raising a question in execution proceedings, which then ought to have been raised, would be able to circumvent the provisions of Section 47, which provides that all questions of the kind mentioned therein shall be determined by the Court executing the decree and not by a separate suit. In our opinion the words " all questions arising " mean all questions which could properly arise or which could properly have been raised in the execution proceedings between the parties to the suit or their representatives. The plaintiffs could have raised their objection about the suit properties being not liable to sale in execution of the mortgage decree before the sale proclamation was issued. They could also have applied for the sale being set aside on the same ground. If they had taken either of these stops, the question would have been between the judgment-debtor and the decree-holder. The position cannot be different merely because the plaintiffs,

judgment-debtors, have raised the question after the sale has been confirmed and after the auction purchaser has obtained possession of the properties. In *Gokulsingh Bhikaram v. Kisansingh*, 34 Bom. 546 the auction purchaser brought a suit to recover possession of the property purchased by him from the defendants, who were the legal representatives of the original judgment-debtor. The defendants resisted the plaintiff's suit on the ground that the property having been the joint property of the original judgment-debtor and the defendants had survived to them after the original judgment-debtor's death and that the plaintiff had obtained no title at the court-sale which he could legally assert as against the defendants. It was held that the question raised by the defendants was one relating to the execution of the decree arising between the decree-holder and the judgment-debtors, that, it fell within Section 244, Civil P.C., (which corresponds to present Section 47), that the defendants should, therefore, have objected to the sale in execution proceedings u/s 244 and that they could not be allowed to attack the sale in the suit brought by the plaintiff. The same argument, which has been advanced before us that the question was not between the parties to the suit, in which the decree was passed, as the auction purchaser cannot be regarded as the representative of either party, was also advanced in that case, but was not accepted. Chandavarkar J. dealt with this argument as follows (p. 352):

"It is now contended that whatever might have been the result if the decree-holder had been a party to the present suit, the dispute now is between the auction-purchaser, who is a stranger to the previous suit and the execution proceedings therein, and the respondents,, and that, therefore, Section 244 does not apply. The answer to that contention is that, though an auction purchaser at a court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of Section 244, yet if the question raised by the judgment-debtor as to the legality of the court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. That is upon the ground that he is precluded by Section 244 from raising the question as a defence in any proceedings other than, those under that section."

It was held in this case that the test in such cases is whether the ground upon which the court-sale is attacked as conferring no title upon the auction, purchaser affects the parties to the suit and could have as between them been raised and determined u/s 244 (present Section 47) and whether the auction purchaser though not a party to that suit is a party interested in the result. If this test is applied in this case, the question raised in the present suit would be between the parties to the suit in which the mortgage decree was passed and the suit would be barred by Section 47.

[9] The same view has been taken by a Full Bench of the Allahabad High Court in

Basti Ram v. Fattu, 8 ALL. 146 (FB) in which it was held that the provisions of Section 244 Civil P.C. 1882: (present Section 47) prohibit not only a suit between the parties and their representatives, but also a suit by a party or his representatives against an auction purchaser in execution of the decree, the object of which is to determine a question which properly arises between the parties or their representatives and relates to the execution, discharge or satisfaction of the decree, and that if the question be of this nature, it is one which: must be determined by order of the Court executing the decree and not by a separate suit. It was further held in that case" that it is immaterial whether the party did or did not raise the question at the time of execution, and that if he did not, he lost the remedy which the Legislature has provided. This case has been followed by the Calcutta High Court in Mohan Singh v. Panachanan Sadhukhan, 53 Cal. 837. In the course of the judgment Page J. observed (p. 841):

"The appellants contend, however, that as their claim in the present suit is brought against a stranger auction-purchaser, who is neither a party to the suit nor the representative of a party, Section 47 can have no application to the present proceedings. The answer to that contention is that the Legislature by enacting Section 47 and Order 21 of the Code intended and provided that all questions arising between the parties to the suit or their representative in interest relating to the execution, discharge or satisfaction of the decree should be determined in the proceedings in which the decree was passed. If a party to the suit or his representatives desire to raise an issue which falls within Section 47, such as whether the sale ought to be set aside on the ground of irregularity or fraud as provided in Order 21, Rule 90, or whether the property sold was liable to attachment in execution of the decree, they must do so in the course of the execution proceedings as provided in the Code and not otherwise. A stranger-auction-purchaser after the sale has become absolute and a sale certificate has been granted ought not to be left in doubt as to whether the parties or their representatives intend in the future to attach the sale in further or other proceedings. If a party to the suit or his representatives in interest refrain from raising a question which falls within the ambit of Section 47 and elect to stand by and do nothing while property alleged to belong to the judgment-debtor is attached and sold in execution of the decree, such persons are not to be permitted thereafter to canvass such questions in other proceedings, or to harass the auction-purchaser by launching a separate suit against him in which the sale is attacked upon some ground which could and ought to have been, raised in the execution proceedings and which falls within Section 47 of the Code."

The same view was taken in Umapati Mukerjee v. Sheikh Suleman, 54 Cal. 419. In Munna Lal v. The Collector of Shahjahanpur, 45 ALL. 56 and in Bulaqi Das v. Kesri, 50 ALL. 686 a contrary view was taken, and it was held that a judgment-debtor can bring a suit to recover possession of the property sold at an auction sale, which was not liable to be sold in execution of the decree. These decisions were not followed in later cases of the Allahabad High Court, in which it was

again held that such a suit is barred u/s 47. See *Imtiaz Bibi v. Kabia Bibi*, 51 ALL. 878 and *Rahim Bakhsh v. Kishen Lal*, ILR (1939) ALL. 385. In the latter case in execution of a decree for sale on a mortgage some property belonging to the judgment-debtor, which did not form part of the mortgaged property, was by mistake included in the sale proclamation, the sale, and the sale certificate. No objection was taken by the judgment-debtor at any of these stages of execution. Subsequently he brought a suit for recovery of this property against the auction-purchaser, who was the decree-holder himself. It was held that the judgment-debtor should have proceeded by way of objections in the execution Court, and his suit was barred by Section 47 and Order 21, Rule 92, Civil P.C. The Madras High Court has also held that such a suit is barred u/s 47 : see *Jainulabdin Sahib v. Krishna Chettiar*, 41 MLJ. 120.

[10] The view, which we are taking, also receives support from three decisions of the Privy Council in *Prosunno Coomar Sanyal v. Kali Das Sanyal*, 19 Ind. App. 166 (p. c.), *Ganapathy Mudaliar v. Krishnamachariar*, 45 Ind. App. 54 (P.C.) and *Ramabhadra Naidu v. Kadiriyasami Naicker* 43 Ind. App. 155 (P.C.). In the first case the plaintiffs, who were the co-sharers of a zamindari, brought a suit to set aside the judicial sale of the zamindari on the ground that the decree-holder, in part satisfaction of his decree, had received from them their proportionate amounts of the debt decreed and had agreed that their shares would not be sold in execution of the decree. It was held that the question was determinable, in virtue of Section 244, Civil P. C., only by an order of the Court executing the decree. In *Ganapathy Mudaliar v. Krishnamachariar*, 45 Ind. App. 64 (P.C.) the mortgagee of an ancestral property of a Hindu obtained against the mortgagor and his two sons, who were minors duly represented by their guardian, a decree for the amount due "to be recovered from defendant 1 personally and by sale of the mortgaged property." In execution of that decree the right, title and interest of the defendants in the mortgaged property was sold and was purchased by the decree-holder himself. After the confirmation of the sale, the survivor of the two sons brought a suit to redeem the mortgage, contending that the decree and sale were nullities and did not affect his right to redeem. It was held that the suit could not be maintained, because u/s 244, Civil P.C., 1882, the validity of the sale could not be questioned in a fresh suit but only by an application before confirmation of the sale to the Court executing the decree. In the course of the judgment it was observed (p. 60):

". . . . Section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction-purchaser at an auction sale as well as the parties to the suit."

Section 47, therefore, applies to a suit between a judgment-debtor and an auction-purchaser, if the question raised in the suit is one which relates to or affects the parties to the suit in which the decree was passed.

[11] In *Ramabhadra Naidu v. Kadiriyasami Naicker*, 43 Ind. App. 155 (P.C.) the suit was brought by a judgment-debtor, son of the original mortgagor, against

the auction-purchaser, who was the assignee of the mortgage decree, to recover possession of the properties, of which, it was alleged, the auction-purchaser had wrongly obtained possession, as they were not included in the mortgage. The defendant auction-purchaser contended that the plaintiff's remedy was by a petition in execution proceedings u/s 47 and not by a separate suit. The Court found that some of the properties claimed by the plaintiff were not covered by the mortgage, but that they were included in the decree, the sale proclamation and the certificate of sale. The Privy Council held that the plaintiff could have raised the same question in execution proceedings, and as he had not done so, he was bound by the sale and the sale certificate issued to the defendant. His suit was therefore dismissed. Their Lordships observed

(p. 161):

". . . . The rights of the mortgagors, however, need not have been taken away by this fact as they were at liberty to have taken proceedings in the suit in order to raise the contention that the; now put forward u/s 47, Civil P.C., 1908, but this they have never done and it is now too late. The sale certificate was in their opinion plain, and its meaning was accepted by all parties at the time, showing that even if they misunderstood the operation of the mortgage they were under no misapprehension as to that of the certificate. Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. There is full opportunity for challenge of all proceedings in the execution of mortgage decrees at the time, and except in clear cases a purchaser ought not to be harassed in his possession by disputes arising years after his purchase."

It is true that in this case the properties, for the recovery of which the suit had been brought, were also included in the decree. But that does not appear to be a fact of any consequence. The suit was, as in the present case, between a judgment-debtor and an auction-purchaser for obtaining possession of properties, which, it was alleged, had been wrongly sold in execution of a mortgage decree. The Privy Council held that the suit did not lie, as no objection that the properties were not liable to sale had been taken in execution proceedings, as could have been done u/s 47. Although there is no discussion in the judgment on this point, it may be assumed, having regard to the decision of the Privy Council, that their Lordships were of the view that the question was one between the parties to the suit in which the decree was passed, within the meaning of Section 47.

[12] In our opinion, therefore, the present suit would be barred u/s 47, Civil P.C., if it is held that the sale of the suit lands was a nullity. If on the other hand the sale is not regarded as a nullity, but the case is considered as being one of material irregularity in publishing and conducting the sale, the suit would be barred under Order 21, Rule 92, Civil P.C. The suit brought by the plaintiffs is therefore not maintainable. We cannot also treat the suit as an application u/s 47, for on the date on which the suit was filed such an application was barred by limitation.

[13] The appeal must consequently fail, and is dismissed.

[14] There will be no order as to costs of this appeal.

[15] Appeal dismissed.