

(1925) 11 AHC CK 0009
In the Allahabad High Court

Mirza Muhammad Zakaria

APPELLANT

Vs

B. Kishun Narain and Muhammad Hafiz and Others

RESPONDENT

Date of Decision : 17-11-1925

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, 47

Citation : (1926) ILR (All) 260 : 92 Ind. Cas. 644

Hon'ble Judges : Sulaiman, J; Mukerji, J

Bench : Division Bench

Judgement

Sulaiman, J.—This purports to be an execution first appeal from an order dated the 6th of July 1925 passed by the Execution Court. It appears that a mortgage-deed for sale was in execution and a proclamation of sale was prepared and issued in the first instance under Order XXI, Rule 66. The date for the sale was fixed as the 9th of July 1925. Three days before this date the respondent Muhammad Hafiz who was till then no party to the execution proceedings filed an application in the Execution Court praying that a certain mortgage-deed dated the 14th of September 1810 in his favour be notified. In his application he set forth the fact that on a previous occasion he had instituted a suit for the recovery of the principal amount due on his deed but that suit was ultimately dismissed. He then recited a passage from the judgment of Mr. Justice Walsh who was one of the learned Judges who disposed of the appeal in the High Court, to the effect that "it by no means follows from the decision (dismissing the suit) that there is no subsidiary liability from the defendant to the plaintiff to pay interest so long as the principal is outstanding", and then after referring to the judgment passed by their Lordships of the Privy Council referred to the covenant in the mortgage-deed under which there was a liability on the mortgagor to pay interest. He then prayed "as ordered by the Honble High Court the condition mentioned above may be notified at the time of the sale". An objection was raised on behalf of the judgment-debtor but the learned Subordinate Judge without deciding as to whether there was or was not any existing liability ordered that "the notification asked for be allowed subject to the amendment that the claim for principal under

the bond of the 14th of September 1910 is no longer recoverable by suit".

2. The report of the amin does not expressly mention in what language he made the notification, but it may be assumed for the purpose of this revision that the notice was given as ordered by the learned Subordinate Judge.

3. The judgment-debtor has appealed from this order.

4. A preliminary objection has been taken that no appeal lies. I am of opinion that this objection is well-founded. Muhammad Hafiz was not a party to the execution proceedings. Neither the decree-holder nor the judgment-debtor admitted the validity of this prior mortgage. The contesting respondent intimated to the Court that his mortgage should be notified. The order passed by the Court was obviously under Order XXI, Rule 66 with a view to include in the proclamation sale an incumbrance to the property. The validity of the mortgage was not considered by the Court or decided by it. Any order passed by the Court under Rule 66 directing the way in which a proclamation of sale should be drawn up on application made, is not made, is appealable under Order XLIII of the Code. Prima facie, therefore, no appeal would lie. The learned Vakil for the appellant, however, has urged before us that inasmuch as this order was passed by an Execution Court and related to the execution of a decree it is appealable, within the meaning of Section 47. Section 47 must be read with Section 2 and the effect of reading both the sections is not to make every order passed by the Execution Court appealable but only such orders appealable as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit. By this order neither the rights of the judgment-debtor nor of the decree-holder were determined by the Execution Court. No appeal, therefore, lies.

5. The learned Vakil for the appellant has asked us to treat this appeal as an application in revision and interfere with the order.

6. Two objections have been raised. The first is that the Court below should not have entertained an application from a person who was no party to the execution proceedings, and the second is that it was entertained at such a late stage as to pre-judice the judgment-debtor. The application of the contesting respondent was made by way of an intimation to the Court and the Court was under Order XXI, Rule 66 bound to show all incumbrances which prima facie existed on the property which was ordered to be sold. It is, therefore, impossible to hold that the Court had no jurisdiction to take note of an alleged claim. If the notification merely informed the auction-purchasers that there was a claim being put forward on behalf of Muhammad Hafiz on the basis of this old mortgage, which claim, however, was not admitted by the decree-holder or the judgment-debtor then there was no harm in the notification. On the other hand if the notification amounted to any mis-statement or misrepresentation, that may be a good ground for setting aside the sale, under Order XXI, Rule 90, as it would then amount to an irregularity.

7. Similarly the fact that this amendment was made only a few days before the sale may be a ground for setting aside the sale if the judgment-debtor succeeds in establishing that substantial injury has been caused in consequence of the lateness of the order. That too is a matter which can be disposed of in the proceedings under Order XXI, Rule 90.

8. It is to be noted that pending this appeal the sale has actually taken place and any directions now made with regard to making the notification clear would be altogether useless and futile, I am, there-fore, of opinion that it is impossible to interfere in revision at this stage.

9. I would, therefore, dismiss this appeal.

Mukerji, J.

10. I entirely agree that no appeal lies and that in the circumstances of this case I am not prepared to entertain the appeal as a revision from the order of the learned Subordinate Judge dated the 6th of July 1925.

11. Briefly, the matter stands thus. Kishun Narain held a mortgage-decree against Zakaria and others. In execution of the decree a sale notification was issued fixing the 9th of July 1925 for sale. On the 25th of May 1925, certain persons Muhammad Hafiz and others, came in with a petition that certain terms contained in a prior mortgage held by them should be notified. The decree-holder and the judgment-debtor both objected but the learned Judge allowed the application subject to a certain modification. It appears that Muhammad Hafiz and others held a prior mortgage dated the 14th of September 1910 over some at least of the properties which were going to be sold at the instance of Kishun Narain. They had obtained a decree for interest which had accrued under the mortgage. Subsequently they brought a suit for the recovery of the principal amount and the interest which subsequently accrued. This second suit of theirs failed in this Court and also in the Privy Council on the ground that Order II, Rule 2 of the C.P.C. barred the suit. Certain observations had been made by one of the learned Judges who heard the appeal in this Court indicating that Muhammad Hafiz and others might still have some remedy. The Privy Council expressed no opinion. Muhammad Hafiz and others, however, still entertain a hope to recover something on foot of the mortgage and they accordingly made their prayer. The learned Subordinate Judge, after hearing the parties, made the order as already indicated.

12. Now the question is whether an appeal is entertainable. As pointed out by my learned brother, it is not every question that arises between a decree-holder and a judgment-debtor that is appealable. In order that it may be appealable, it must be a decree and must come in Section 2 of the C.P.C. Be that, however, as it may in this particular case, the decree-holder and the judgment-debtor were atone in, attempting to defeat the claim of Muhammad Hafiz and others. It is clear, therefore that, by no stretch of imagination, can the case be brought within the purview of Section 2 and Section 47 of the C.P.C. No appeal, therefore, lies.

13. Coming to the question of revision I fail to see what irregularity has the Judge committed. The Judge was bound, in the interest of intending purchasers, to give them as much information as possible about the property which he was going to sell. If Muhammad Hafiz and others had a bona fide claim, it did not matter whether it was going to succeed or going to fail. The Judge could not enter into that intricate question. He was, in my opinion, bound to tell the intending purchasers, that there was such a claim and that they might beware of it. The order, therefore, was perfectly correct and it is not open to question by way of revision.

14. It has been urged upon us that the order was passed very late and that it was likely to frighten the intending purchasers. As may be guessed, the sale proclamation was issued long before the 6th of July, for the 9th of July had already been fixed for sale. If it be a fact that owing to the late notification of the claim, any intending purchaser has been frightened, not knowing clearly what was the matter, it would be a matter for the Subordinate Judge to enquire in a proceeding, if any, has been taken, under Order XXI, Rule 90 of the C.P.C. That has nothing to do with the case before us, at present.

15. I agree, therefore, that the appeal should be dismissed and there is no good ground for treating the appeal as a petition of revision.

16. The appeal is dismissed with costs. We allow Rs. 50 as Counsel's fees for the respondents Muhammad Hafiz and others.