

(1920) 07 BOM CK 0023
In the Bombay High Court
Case No : Second Appeal No. 244 of 1917

Vithaldas Prabhu

APPELLANT

Vs

Subraya Manjappa

RESPONDENT

Date of Decision : 13-07-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 53

Citation : AIR 1921 Bom 127 : (1920) 22 BOMLR 1304

Hon'ble Judges : Norman Macleod, J; Fawcett, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Norman Macleod, Kt., C.J.—This is an appeal u/s 47 of the Civil Procedure Code. The plaintiff and defendant in Suit. No. 119 of 1911 prayed that the decree-holders realized much more than what was due on the decree which was sought to be executed, and prayed that the Darkhast should be struck off. The application has been granted in both the lower Courts. What had happened was this, in execution of their decree, the decree holders attached the mortgage decree in favour of their judgment-debtors. Order XXI, Rule 53, lays down the procedure to be followed when a decree, either for the payment of money or for sale in enforcement of a mortgage or charge is attached. The Court shall under Sub-rule (2), on the application of the creditor who has attached the decree of the judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. Instead of doing that the Court put up the decree for sale, and the decree was purchased for RS. 200 by the decree-holder. These proceedings were absolutely wrongly conceived, and certainly it is very strange that in the face of Order XXI, Rule 53, the Court should have allowed such a sale to take place when the decree-holder having become the purchaser of the decree proceeded to recover what he could on the decree and realized Rs. 600. Obviously there is no equity whatever in favour of the decree-holder who seeks to pocket Rs. 400 which really belonged to his

judgment-debtor.

2. But it has been argued that the matter which has been dealt with by the lower Courts is *res judicata* because the 1st defendant had. endeavoured to stop the sale, and on his application it was held that the sale was valid. The 3rd opponent was not served with notice of that application. An order was obtained from the Court either that the notice might be served on the 1st opponent, or if he refused to accept it, that substituted service should be effected. The 1st opponent accepted service of the notice. But that cannot be taken as service on opponent 8 who has not been proved to have been living with opponent 1 at the time. It is quite possible that if opponent 1 had not accepted service, then substituted service, according to the provisions of the Code, would have been effected. Then opponent 3 would be bound by it. But all that we have before us is that notice was served on some one who did not represent the 3rd opponent. Therefore he cannot be considered as being bound by the decision in the matter. That is sufficient to dispose of the appeal, because, in my opinion, it is perfectly clear the appellants cannot take advantage of the wrong procedure "which was adopted by the Court in order to put money in their pocket which really belonged to their judgment-debtor. What would have happened if an outsider had purchased the decree is a question which need not be gone into. The appeal is dismissed with costs.

Fawcett, J.

3. I concur.