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been brought before us on appeal from the District Judge's order of remand. We think that no appeal lay to the District Judge. Authority for this proposition is to be found in *Lucky Churn Chowdhry* v. *Budurr-un-nissa* (1), and in *Parbati* v. *Toolsi Kapri* (2). It seems to be clear that the dismissal of the suit by the first court was a form of dismissal for default, and therefore excluded from the definition of the word "decree" in the present Code of Civil Procedure. The plaintiff's remedy was under order IX, rule 4, of the present Code and presumably, to some extent at any rate, it is still open to him. This appeal must prevail. We set aside the order of the District Judge and restore that of the court of first instance. The appellant is entitled to his costs in this and in the lower appellate court.

Appeal allowed.

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March, 14.

Before Mr. Justice Piggott and Mr. Justice Walsh.

HARDWARI LAL (DECREE-HOLDER) *v.* SALAMAT-ULLAH KHAN, (OBJECTOR) AND AMAN-ULLAH KHAN (JUDGEMENT-DEBTOR)*

Civil Procedure Code (1908), *order XXI, rule* 90—*Sale in execution of a decree—Application to set aside a sale by person claiming to be the real owner.*

Where immovable property has been sold in execution of a decree against the ostensible owner, a person claiming to be the real owner is not competent to ask the court to set aside the sale under order XXI, rule 90, of the Code of Civil Procedure. *Abdul Aziz* v. *Tafaj-uddin* (3), referred to.

THE facts of this case were as follows :—

A mortgage decree was passed against one Amanat-ullah and the property mortgaged was sold on the 20th of March, 1915. On the 9th of March, 1915, Salamat-ullah, the father of Amanat-ullah, brought a suit for a declaration that he was the real owner of the property sold. Whilst that suit was pending, Salamat-ullah also applied under order XXI, rule 90, of the Code of Civil Procedure to have the sale set aside. The court below allowed his application and set aside the sale. The decree-holder appealed to the High Court.

* First Appeal No. 275 of 1915, from a decree of Soti Raghuvansa Lal, Subordinate Judge of Shahjahanpur, dated the 24th of July, 1915.

(1) (1882) I.L.R., 9 Calc., 627. (2) (1913) 20 Indian Cases, 1.

(3) 23 Indian Cases, 839.

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The Hon'ble Dr. *Sundar Lal*, for the appellant.—

Salamat-ullah Khan has no *locus standi* to apply under order XXI, rule 90, of the Code of Civil Procedure, 1908. He is not a person whose interests are affected by the auction sale. It has been held that a person whose title is paramount to that of the mortgagor cannot be a party to the suit on the mortgage. His title being hostile to those of both the parties to the suit, he must go out of the record. His interests are not affected by the sale any more than they had been affected by the mortgage. As a matter of fact his title to the property has not been found one way or the other by the lower court. Even if it be proved that Salamat-ullah was the real owner his interests are not affected by the auction sale. Again if he be not really interested in the property he cannot apply His remedy was by a separate suit and this remedy he has sought already. Comparing section 311 of the Code of Civil Procedure, 1882, with order XXI, rule 89, of the present Code it will be found that there has been a material change in the law. The rulings under the old Code have no bearing on the present question.

Dr. *S. M. Sulaiman*, for the respondents :—

Muhammad Salamat-ullah could not have intervened either in the suit or in the execution proceedings. He had therefore to stand by. Now if the real owner allows a property to be held *benami* and he stands by when the *benamidar* trasfers it to a third party, his interests are affected and hence he can apply under order XXI, rule 90, of the Code of Civil Procedure, 1908; *Abdul Gani* v. *A. M. Dunne* (1) and *Timmanna Banta* v. *Mahabala Bhatta* (2). These are no doubt rulings under the old Code, but the wording of the present Code (order XXI, rule 90) is more general ; *Abdul Aziz* v. *Tafaj-uddin* (3). The sale was not after an ordinary attachment but in execution of a decree on a mortgage and when we have stood by at the time of the mortgage our interests are affected under section 41 of the Transfer of Property Act, 1882.

PIGGOTT and WALSH, JJ. :—This is an appeal against an order setting aside a sale under the provisions of order XXI, rule 90,

(1) (1892) I. L. R., 20 Calc., 418 (2) (1895) I. L. R., 19 Mad., 167.

(3) 23 Indian Cases, 889.

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of the Code of Civil Procedure. The first point taken is that the application under that rule was made by one Salamat-ullah Khan who was neither the decree-holder nor the judgement-debtor, nor a person otherwise entitled to make any such application. We think this contention must prevail. The decree was one passed against Amanat-ullah Khan, a son of Salamat-ullah Khan aforesaid. It was a mortgage decree. A decree absolute was obtained on the 17th of January, 1913, and the sale actually took place on the 20th of March, 1915. In the meantime Salamat-ullah Khan had filed a suit, on the 9th of March, 1915, asking for a declaration that he was himself the real owner of the property covered by the mortgage and ordered to be sold in execution of the same. This suit is sill pending. The question is whether under these circumstances Salamat-ullah is a person whose interests are affected by the sale, within the meaning of order XXI, rule 90, aforesaid. It is of little use to refer to reported cases which turn on the wording of section 311 of the former Code of Civil Procedure (Act XIV of 1882). There has been a substantial and intentional alteration in the law effected by the passing of the present Code. Nor is it of much use to refer to cases such as that of *Abdul Aziz* v. *Tafaj-uddin* (1), in which the learned Judge has remarked that the expression "whose interests are affected by the sale" has a wider import and a wider scope than the corresponding expression used in section 311 of Act XIV of 1882. For certain purposes the phrase used in the present Code may be a wider one, but we have to apply the words to the facts immediately before us. It seems to us that it would be a dangerous proposition to lay down that the interests of Salamat-ullah Khan are affected by the sale held on the 20th of March, 1915, while his declaratory suit was actually pending. To say that his interests are affected by that sale might be to pronounce an opinion as to the possibility of his success in the declaratory suit. If his property has been sold in execution of a decree obtained against his son, and he is not estopped by the provisions of section 41 of the Transfer of Property Act (Act IV of 1882), from setting up his true title, then the sale is a nullity as against him and cannot affect his interests.

(1) 23 Indian Cases, 839.

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If, on the other hand, he has no real interest in the property in suit he should obviously not be permitted to maintain the application under order XXI, rule 90. We therefore accept this appeal; set aside the order of the court below, allowing the application of Salamat-ullah Khan, and direct the record to be returned to that court in order that it may proceed to pass all necessary orders confirming the sale and to dispose of the matter in accordance with law. The appellant will get his costs of this appeal.

Appeal decreed.

1916

March, 17.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

KHURSHED ALI AND OTHERS (PLAINTIFFS) *v.* ABDUL MAJID AND OTHERS (DEFENDANTS).*

Pre-emption—Transfer—Mortgage—Use of the term "makbuza" *not sufficient to constitute a mortgage.*

The material portion of a document executed by the borrowers to secure a loan was as follows:—

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makbuza*) and if the creditors make delay in realizing the principal and interest then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makbuza*)."

A claim for pre-emption was brought based upon this document, which was claimed to be a sale, or at least a mortgage.

Held by RICHARDS, C. J., that it was very difficult to distinguish the transaction evidenced by the document in question from what is ordinarily called a "simple mortgage". On a construction, however, of the wajib-ul-arz it was held not to include mortgages which did not involve a change of possession.

Held by TUDBALL, J., that the document under consideration did not amount to a mortgage, but at most constituted a charge on the property referred to therein. *Dalip Singh* v. *Bahadur Ram* (1), referred to.

THIS was a suit for pre-emption based upon the wajib-ul-arz and upon a document executed by the defendants, the material portion of which was in the following terms:—

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* Second Appeal No. 1759 of 1914, from a decree of Durga Datt Joshi, District Judge of Azamgarh, dated the 26th of October, 1914, reversing a decree of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 28th of July, 1914.

(1) (1912) I.L.R., 34 All., 446.