

APPELLATE CIVIL.

1920
July, 30.

Before Mr. Justice Walsh and Mr. Justice Gokul Prasad.

PURSHOTTAM SARAN (JUDGMENT-DEBTOR) v. HARGU LAL (DECREE-HOLDER) AND PAHLADI LAL (AUCTION-PURCHASER).*

Civil Procedure Code (1908), order XLV, rule 5—Order of appellate court staying execution before appeal has been filed—Jurisdiction—Powers of Vacation Judge of High Court—Rules of High Court, Chapter 1, rule 3—Effect of discharge of stay order.

A single Judge of the High Court, sitting as vacation Judge, granted a stay of execution of a decree passed by a subordinate court before any appeal had been filed in the High Court, but on the assurance of the applicant's vakil, which was made good, that an appeal would be filed immediately on the expiry of the vacation.

Held that the order was without jurisdiction. Although a single Judge in the vacation has, generally speaking, jurisdiction to pass an order for stay of execution, his jurisdiction is dependent on there being already an appeal pending in the High Court. *Bhugwan Chunder Ghose and another (1), Bhagwat Rajkoer v. Sheo Golam Sahu (2) and Balkishen Sahu v. Khugnu (3)* referred to.

THE facts of this case were as follows :—

One Sahu Hargu Lal obtained a decree for sale on a mortgage and in execution of that decree, sought to sell the property mortgaged, and the 20th of September, 1919, was fixed for sale.

Seth Purshottam Saran, a transferee of the mortgaged property, objected to the sale on various grounds, but by an order, dated the 13th of September, 1919, the Subordinate Judge overruled the objections. The High Court being closed for the long vacation, the objector could not file an appeal against the order, dated the 13th of September, but he filed an application purporting to be under order XLI, rule 5, of the Code of Civil Procedure and obtained an *ex parte* order for stay of sale on the 19th of September, 1920, from the vacation Judge. The order of the High Court did not reach the Subordinate Judge on the 20th, but a telegram was despatched by the vakil at Allahabad and the fact was brought to the notice of the Subordinate Judge that a stay order had been issued. Thereupon the Subordinate Judge passed an order to the effect

* First Appeal No. 12 of 1920, from an order of Lalita Prasad Johri Subordinate Judge of Moradabad, dated the 17th of January, 1920.

(1) (1866) 6 W. R., Misc. R., 15. (2) (1904) I. L. R., 31 Calc., 1061.

(3) (1904) I. L. R., 31 Calc., 722.

that the sale would proceed, but if it did transpire that the High Court had issued an order for the stay of the sale, then the sale would be treated as a nullity. The sale was concluded and the property was purchased by the respondent No. 2. At the time of confirmation the judgment-debtor (Purshottam) objected to the sale by two separate applications, one under order XXI, rule 90 (irregularity) and the other purporting to be under section 47 of the Code of Civil Procedure. These objections were, however, overruled by the Subordinate Judge on the ground that the stay order passed by the vacation Judge on the 19th of September had been discharged and therefore the sale was not affected thereby and the sale was confirmed. The judgment-debtor Purshottam Saran, appealed to the High Court.

1920

 PURSHOTTAM
 SARAN
 v.
 HARGU LAL.

Babu *Piari Lal Banerji*, (with Mr. *B. E. O'Connor*) for the appellant:—

The real point in the case is whether the sale held after the stay order had been passed by the High Court, was a valid sale. If the order, dated the 19th of September, had been obtained by fraud and by concealment of material facts, it would have been probably ineffectual, but in the present case I am ready to show that the affidavit filed by the applicant on the 19th of September concealed nothing. The next point in the case is whether a stay could be granted without an appeal being filed. Paragraph (1) of order XLI, rule 5, presupposes the existence of an appeal. In paragraph 2 of rule 5 the words "before the expiration of the time allowed etc." clearly contemplate a stay where an appeal has *not* been filed. The fact of not filing the appeal was due not to the fault of the appellant but because the Court was closed. The appeal was actually filed on the day the Court re-opened, and when the application for stay was filed before the vacation Judge he was given an assurance that the appeal would be filed on the day the Court re-opened. He accepted the situation and the appeal was subsequently filed; the doctrine of *nunc pro tunc* applied. The word "appellate Court" does not necessarily mean a Court where an appeal has been filed but a Court where an appeal may be filed.

1920

PURBHOTTAM
SARAN
v.
HARGU LAL.

What a Court of first instance could do under the second paragraph of order XLI, rule 5, the appellate Court could do under the provisions of the same rule read with section 107 of the Code of Civil Procedure. It might be that two Courts would have concurrent jurisdiction and might pass conflicting orders, but that cannot be helped. Under the Code of Criminal Procedure, the District Magistrate, the Sessions Judge and the High Court have concurrent jurisdiction under section 435.

The Hon'ble Dr. *Tej Bahadur Sapru*, (Munshi *Kamla Kant Varma* with him) for the auction purchaser was heard in reply.

Babu Saila Nath Mukerji, for the decree-holder was not called upon.

WALSH and GOKUL PRASAD, JJ. :—This appeal, which arises out of two applications made to the execution court, raises several questions. We propose to deal, so far as the decision of the case goes, with one point of law only which in our view is fatal to the appeal. Two applications were made to the court below on the 27th of October, 1919, to set aside a sale or, in other words, to declare that a sale which had been only held provisionally had become void in the events which had happened. There is a difficulty about the application under order XXI, rule 90. It is clear that the reason why two applications were made was that a difficulty was felt by the applicants and it was desirable to have an alternative or second string to his bow. The application under order XXI, rule 90, i.e., the application 112 C, breaks down by reason of the fact that no irregularity in publishing or conducting the sale was alleged or proved and no attempt was made to prove any loss resulting therefrom, and it is plain law covered by authority, namely, *Shirin Begam v. Agha Ali Khan* (1), that it is necessary for the applicant to make that position good. The other application, which is the substantial one and which has formed the subject of argument before us, we have treated as an application under section 47 arising out of the execution of the decree, being in substance an application to declare the sale void and of no effect. For the purpose of the point of law to be decided it is not necessary to

(1) (1895) I. L. R., 18 All., 141.

set out the whole of the history of this matter. It is sufficient to say that the applicant, Lala Purshottam Saran, purchased the interest of the judgment-debtor in the property in question subject to a heavy liability under a mortgage decree which had been obtained by Hargu Lal, the decree-holder, in 1917, and in January, 1919, the decree-holder made an application for sale. After considerable delay objections were taken by the judgment-debtor or his successor and were heard and disposed of on or about the 12th of September, and an application was made by Purshottam Saran, *ex parte* to this High Court, which forms the subject of our decision. At that time no appeal had been filed against the order dismissing the objections. Indeed there could be none, because the High Court was closed except for vacation business, and it was therefore necessary that application should be made to the vacation Judge. The vacation Judge was informed by affidavit that no appeal had been filed and that it was proposed to file an appeal at the earliest possible moment, namely, at the commencement of the next sittings of the Court. In view of the fact that security had been filed by the applicant, the vacation Judge entertained the application and granted a stay of the sale. The sale had been fixed for the next day and it was not possible for the order of the High Court to reach the court below in time to stop the sale. Arrangements were made by which the court below was informed by telegram of the order which the High Court had made that day. The court, being in an obvious difficulty, made what turns out to have been a very sensible order. Having no order of the High Court before it, it refused to stop the sale, but made an order that if it should turn out that the sale had been properly stayed by the High Court, it would have to be cancelled. In the face of an order like that both parties of course would proceed with the sale at their own risk. On the 27th of October, an application was made *ex parte* to the Subordinate Judge asking for an order that the sale be declared void, and the learned Judge appears to have made an order to that effect, but at the instance of the other party, also *ex parte*, subsequently cancelled it. It is not necessary to deal with the legal effect of this particular

1920

PURSHOTTAM
SARAN
v.
HARGU LAL.

1920

PURSHOTAM
SARAN
v.
HARGU LAL.

proceeding, but it is desirable to point out to the learned Judge that, whether he could or could not cancel the order which he had made on the 27th of October, if he made up his mind to do so, the proper way to do so would be by writing or dictating a fresh order stating that his previous order was cancelled and giving the reasons for such cancellation. The practice of scratching out or attempting to obliterate a previous order already passed is wrong. Passing from that the next important step was that an appeal, towards the end of October, was filed in the High Court, when the High Court was open for the purpose. The auction-purchaser was not made a party to that appeal and he was compelled to apply to the High Court to be made a party. An order to this effect was made. The hearing of the appeal was expedited and on the 19th of December, 1919, the appeal was dismissed on the merits and the order of stay granted by the vacation Judge on the 19th of September, was discharged. We may here, in passing, observe that the learned Judge of the court below has taken an erroneous view of the effect of a discharge of this kind. Assuming the stay order to have been properly obtained and granted within the jurisdiction of the Court, it is good as far as it goes and as long as it lasts until it is discharged; and a proper order duly made according to law, if it is subsequently discharged for good reasons, cannot be treated as of no effect. We are left with the question whether the order staying the sale of the 19th of September, was a good order. Chapter I, rule 3, of our own High Court Rules enables a vacation Judge to exercise the appellate jurisdiction vested in the Court in any matter connected with or arising out of the execution of a decree which he considers urgent, and that would clearly authorize him to grant a stay of execution of a decree in respect of which an appeal was pending in the appellate Court. But an appellate Court has no jurisdiction to grant a stay of execution in a matter of which it is not already seised in appeal. The matter has been strongly argued on behalf of the appellant on the terms of clause (1) of rule 5, and if clause (1) stood alone, there would be a good deal to be said for the contention, but the provisions in clause (2), which empowers the court which passed the decree

to grant a stay on sufficient cause being shown during the time provided by law for presenting an appeal, make it quite clear that that court alone has jurisdiction during the period before the appeal is presented and we think that this is the proper interpretation of rule 5 as a whole. We are confirmed in this view by such authority as appears to exist upon the subject. In an unnamed ruling reported in the Weekly Reporter (1) a court of two Judges held that the High Court could not, under a provision of the law corresponding to the present order XXI, rule 6, direct a lower court to take security in execution of a decree when no appeal had been preferred to the appellate court against such decree. In 1904, a two Judge Bench in Calcutta, in the case of *Bhagwat Rajkoer v. Sheo Golam Sahu* (2), took the view that it is the court which has seisin of the appeal which is competent to stay the carrying out of the order appealed against pending the hearing of the appeal, and it was not competent to an appellate court to stay proceedings in the execution of a decree of a subordinate court merely because an appeal had been preferred against an order of the lower court refusing to set aside the decree. In that case there was no appeal pending to the appellate court against the decree itself. By implication a strong Bench of five Judges in Calcutta took the same view, in the case of *Balkishen Sahu v. Khugnu* (3) That Court held that the court which has seisin of the appeal can make an order staying proceedings pending the hearing. It is plain from the referring order which caused that Bench to be constituted that they took the view that such an order could not be made unless the court had seisin of the appeal. We, therefore, come to the conclusion that the order in this case which Purshottam Saran obtained in his own favour was made without jurisdiction and could have no legal effect in nullifying the sale which took place on the 20th of September. On this ground alone the appeal fails and the application was rightly dismissed, though, as appears by what we have said, not upon the grounds upon which the learned Judge dealt with the matter in his judgment. Both the respondents, the decree-holder and the auction-purchaser, must have their costs of this appeal.

Appeal dismissed.

(1) (1866) 6 W. R., Misc. R., 15.

(2) (1904) I. L. R., 31 Calc., 1081

(3) (1904) I. L. R., 31 Calc., 722.

1920

PURSHOTTAM
SARAN
v.
HARGU LAL.

FULL BENCH.

Before Mr. Justice Tudball, Mr. Justice Ryves and Mr. Justice Gobul Prasad.

HUKUM SINGH (DEFENDANT) v. LALLANJI, (PLAINTIFF) AND MATA
DIN AND OTHERS (DEFENDANTS)*.

Act No. IV of 1882 (*Transfer of Property Act*), sections 85, 89—*Civil Procedure Code* (1908), order XXXIV, rule 5—*Mortgage—Suit on prior mortgage without impleading puisne mortgagee—Effect of failure to implead—Suit for sale by puisne mortgagee, impleading prior mortgagee—Duty of puisne mortgagee to redeem the prior mortgage.*

A prior mortgagee, without impleading the puisne mortgagee, sued for and obtained a decree for sale on his mortgage under the provisions of section 88 of the *Transfer of Property Act*, 1882. After the *Code of Civil Procedure* of 1908 had come into force, the decree-holder obtained a decree absolute for sale. Before, however, the sale actually took place, the puisne mortgagee instituted a suit for sale on the basis of his mortgage, and in such suit he contended that the prior mortgagee, by omitting to implead him, had forfeited his right to execute his decree.

Held that this was not so. The position of the puisne mortgagee was rendered neither better nor worse by his not having been impleaded in the prior mortgagee's suit. If the prior mortgage was valid, the puisne mortgagee was not entitled to a decree for sale without giving the prior mortgage an opportunity of redeeming him. *Janki Prasad v. Kishen Dat* (1) dissented from. *Ram Prasad v. Bhikari Das* (2), *Deokali Kunwar v. Alim-un-nissa Bibi* (3) and the judgment of BANERJI, J., in *Bhawani Prasad v. Kallu* (4) referred to. *Het Ram v. Shadi Ram* (5) distinguished.

THE facts of this case were as follows :—

Two simple mortgages of the same property were executed, the first in 1896 and the second in 1907, in favour of different mortgagees. In 1908 the first mortgagee sued for sale on his mortgage, without impleading the second, and obtained a decree for sale under section 88 of the *Transfer of Property Act*. Later on, he applied for and obtained a decree absolute for sale under order XXXIV, rule 5, of the *Code of Civil Procedure*, 1908. When he proceeded to sell the property the second mortgagee brought a suit for sale upon his own mortgage, impleading the mortgagors and the first mortgagee, and praying further for a

* Second Appeal No. 1212 of 1917, from a decree of D. R. Lyle, District Judge of Agra, dated the 28th of April, 1917, confirming a decree of Govind Sarup Mathur, Munsif of Fatehabad, dated the 29th of September, 1916.

(1) (1894) I. L. R., 16 All., 478.

(3) Weekly Notes, 1901, p. 22.

(2) (1903) I. L. R., 26 All., 464.

(4) (1895) I. L. R., 17 All., 537.

(5) (1913) L. R., 45 I. A., 130; I.L.R., 40 All., 407.