1921

EMPEROR
v.
SUKHNANDAN
SINGH.

and there is no interference with their so doing. The decision in the case of *Ahmad Ali* v. *King-Emperor* (1) is not in point, because the grove used for the purpose of gambling in that case was a private grove to which the public did not have access. The question as to whether the grove in this case was or was not a public place presents little difficulty. When the public have access to a place, without their access being refused or interfered with, that place is a public place whether the public have a right to go there or not. Authority for this proposition will be found in *Queen* v. *Wellard* (2). Lord COLERIDGE laid down there that a place was a public place if the public were in the habit of resorting to it and no one prevented them from so doing. GROVE, J., laid down that a public place is one where the public go, no matter whether they have a right to go or not. This view was accepted in the case of *Queen Empress* v. *Sri Lal* (3). EDGE, C. J., laid down that a public place was a place to which the public had by right or by permission or by usage or otherwise, access. I, therefore, find that the applicants were gambling in a public place and they were rightly convicted. I dismiss this application.

Application dismissed.

FULL BENCH.

1922
January, 3.

Before Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Lindsay.

SITA RAM (DECREE-HOLDER) *v.* JANKI RAM (JUDGMENT-DEBTOR).*

Civil Procedure Code (1908), Order XXI, rules 71 and 84—Execution of decree—Failure of auction purchaser to make deposit of 25 per cent.—Property re-sold next morning—"Forthwith"—Order against defaulting purchaser to make good deficiency of price on re-sale—Appeal—"Decree."

The highest bidder at an auction sale in execution of a decree failed to deposit the 25 per cent. of the purchase money which he was required by law to deposit on the spot. In consequence of this the property for sale was re-sold, and, as the first sale had taken place somewhat late in the day, the re-sale was held the following morning. The property realized a much lower price on the re-sale than it had at first, and the judgment-debtor applied for

* First Appeal No. 94 of 1921, from an order of J. Allsop, District Judge of Ghazipur, dated the 13th of April, 1921.

(1) (1904) 1 A. L. J., 13. (2) (1884) L. R., 14 Q. B. D., 63.

(3) (1895) I. L. R., 17 All., 166.

an order against the first purchaser to make good the deficiency,—which he obtained.

Held that the re-sale had been held "forthwith" within the meaning of order XXI, rule 84, of the Code of Civil Procedure, and the order was a good one. It was not necessary as a condition precedent to the making of such an order that the highest bidder should have made the deposit required. *Amir Begam* v. *The Bank of Upper India, Ltd.* (1) not followed.

Held also, that the order was appealable. *Ram Dial* v. *Ram Das* (2) approved. *Deoki Nandan Rai* v. *Tapesri Lal* (3) overruled.

THE facts of this case were, briefly, as follows:—

Certain house property of the respondent was put up for sale in execution of a Civil Court decree. In the execution sale the present appellant was one of the bidders and having made the highest bid of Rs. 5,050, he was declared to be the purchaser. But he failed to pay the deposit of 25 per cent. of the purchase-money required by order XXI, rule 84 (1), of the Code of Civil Procedure. As it was late, the officer conducting the sale announced that the property would be re-sold next morning, and it was so re-sold. On the second sale the property fetched only Rs. 2,850. This was more than the decretal amount, so that the decree was satisfied.

Subsequently the judgment-debtor (the present respondent) applied to the court under order XXI, rule 71, of the Code of Civil Procedure to make the appellant liable for the deficiency of price which happened on the re-sale by reason of the appellant's default.

The court of first instance dismissed the application of the judgment-debtor on the ground that there had not been a re-sale "forthwith."

On appeal the District Judge held that the re-sale had taken place "forthwith" within the meaning of the rule and remanded the case under order XLI, rule 23, of the Code of Civil Procedure for the determination of the other questions involved and the disposal of the case on the merits.

From this order of remand the defaulting purchaser preferred this appeal.

Babu *S. C. Das* (for Babu *Sital Prasad Ghosh*) for the appellant:—

There are two submissions to be made. Firstly, no appeal lay to the lower appellate court, so that the decision of the Munsif

(1) (1908) I. L. R., 30 All., 278. (2) (1876) I. L. R., 1 All., 181.
(3) (1892) I. L. R., 14 All., 201.

1922

SITA RAM v. JANKI RAM.

was final. A right of appeal must be provided for by Statute. There is no inherent power in any court to confer on a party this right. In the Code of Civil Procedure there is no specific provision for an appeal from the decision in a proceeding under order XXI, rule 71. Nor does this decision amount to a "decree," in which case the appeal could certainly lie. Section 2 (2) of the Code defines "decree." There being no "suit" the adjudication in the present case could not be said to be a "decree." A comparison between section 145 of the Code and rule 71 of order XXI will suggest that if the Legislature had intended to allow a right of appeal in the latter case, it would have expressly mentioned it. The judgment-debtor had an alternative remedy by "suit" for this deficiency. From a decree in such suit the aggrieved party could appeal. *Amir Begam* v. *The Bank of Upper India, Limited* (1), and *Kameshwar Narain Singh* v. *Musammat Harbans Babui* (2). In the Allahabad case a suit was actually brought. The leading case in my favour is the Full Bench case of *Deoki Nandan Rai* v. *Tapesri Lal* (3). Secondly, when the appellant failed to make the deposit of 25 per cent. of the purchase-money he did not become liable to pay the deficiency on the second sale, as there was no re-sale "forthwith" as contemplated by the rules.

Rules 69, 71 and 84 of order XXI contemplate cases in which some additional expenses are incurred after the first sale falls through. There being no deposit of 25 per cent. there was no sale to the appellant. *Amir Begam* v. *The Bank of Upper India, Limited* (1) and *Ajoodhya Persad* v. *Gopal Dutt Misser* (4).

Dr. *M. L. Agarwala* and Munshi *Kamla Kant Varma*, for the respondent:

The closing words of order XXI, rule 71, have to be considered. The whole proceeding that follows upon an application under that rule is to be treated as if it were a proceeding in execution of a decree. Hence an appeal lies. As regards the comparison between section 145 and rule 71 of order XXI, a surety being always a stranger, it was necessary to introduce express words about a right of appeal. But the purchaser is not

(1) (1908) I. L. R., 30 All., 273.
(2) (1919) 50 Indian Cases, 59.
(3) (1892) I. L. R., 14 All., 201.
(4) (1872) 17 W. R. C. R., 271.

1922

SITA RAM
v.
JANKI RAM.

always a stranger. A decree-holder may purchase in an auction sale. It has been held by the earliest Full Bench in this Court, *Ram Dial* v. *Ram Das* (1), that an appeal lies from an order passed on an application to make a defaulting purchaser liable for the loss occasioned by a re-sale. In *Deoki Nandan Rai* v. *Tapesri Lal* (2), it is to be borne in mind that the appellant being the defaulter the sympathy of the court was against him.

The following cases were also referred to: *Amir Baksh Sahib* v. *Venkatachala Mudali*(3) and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (4).

Babu *S. C. Das* in reply :—

The closing words of rule 71, order XXI, only lay down the manner in which the proceeding is to be conducted. They do not confer a right of appeal.

PIGGOTT, WALSH and LINDSAY, JJ.:—The case before us, whether it be described as a first appeal *from* order or as an application in revision, arises under the following circumstances:—

Janki Ram and others were the judgment-debtors under a certain decree. Certain house property, belonging either to Janki Ram or to all the judgment-debtors, was taken in execution of the decree and put up for sale. One Sita Ram took part in the auction sale and bid up to a sum of Rs. 5,060. This being the highest bid offered, it was accepted by the sale officer. Sita Ram then failed to make the deposit of 25 per cent. of the purchase-money which he was required to make by the rules. It being then late in the day the sale officer informed all the parties concerned, including any other bidders who were present at the time, that he would put up the property for sale again on the following morning. He did so, and that same property was purchased for a sum of Rs. 2,850. This was more than sufficient to satisfy the decree, so that the decree-holder ceased to have any further interest in the matter. Janki Ram subsequently applied to the court to make Sita Ram liable for the difference in price between the sum of Rs. 5,060 bid by him and the sum of Rs. 2,850 eventually realized at the sale which

(1) (1876) I. L. R., 1 All., 181.
(2) (1892) I. L. R., 14 All., 201.
(3) (1895) I. L. R., 18 Mad., 439.
(4) (1897) I. L. R., 25 Calc., 99.

1922

SITA RAM *v.* JANKI RAM.

took place on the second morning. There has been some argument regarding the precise form of the application made by Janki Ram to the court, but no substantial question turns upon this. In effect Janki Ram asked the court to enforce in his favour the right recognized by order XXI, rule 71, of the Code of Civil Procedure. Sita Ram entered an appearance and raised a number of objections. One was to the effect that Janki Ram alone was not entitled to maintain such an application without the concurrence of the other persons who had been judgment-debtors along with him. Another point taken was that the re-sale had not taken place " forthwith " within the meaning of order XXI, rule 84, of the Code. There had also been a claim on the part of Janki Ram for interest on the deficiency and his right to claim interest was contested by Sita Ram. A point was also taken that the application was not maintainable at all because there had been no certificate by the sale officer. The court before which this application was made dealt with two of the points raised only. It held, on the strength of a reported decision of this Court, that the absence of a formal certificate did not make Janki Ram's application any the less maintainable. It would seem that, whether or not there was any formal certificate, the sale officer did report to the court the fact that there had been a sale at which Sita Ram had bid up to the sum of Rs. 5,060 and a subsequent sale at which the price realized was only Rs. 2,850. There does not seem to be any substance in this objection. The questions raised regarding Janki Ram's right to maintain the application without the concurrence of the other judgment-debtors and with regard to the claim for interest were not determined at all. The court held, however that there had not been a re-sale " forthwith," as required by the rule, and on this ground alone proceeded to dismiss Janki Ram's application. The latter appealed to the District Judge. In that court two questions were argued and determined. The District Judge held that the re-sale had taken place " forthwith " within the meaning of the rule. He was, however, faced with a further argument based upon a decision of this Court, *Amir Begam* v. *The Bank of Upper India, Limited* (1). It was there held that, under the analogous

(1) (1908) I. L. R., 30 All., 278.

provisions of the Code of Civil Procedure of 1882, a second auction sale held by reason of a former purchaser's failure to make the prescribed deposit was not a "re-sale" within the meaning of section 293 of that Code, corresponding with order XXI, rule 71, of Act No. V of 1908, and that consequently neither the decree-holder nor the judgment-debtor had any remedy against a purchaser who made no deposit at all. In effect this Court limited the application of that rule to cases in which a purchaser, after making the 25 per cent. deposit, failed to pay the balance of the purchase-money. It has been pointed out to us in argument that the view taken by this Court has not been accepted by the High Courts of Calcutta, Madras or Bombay, but we do not propose to discuss the state of the law as it stood under the Code of 1882. We agree with the learned District Judge that the position is changed by reason of an alteration made in order XXI, rule 84, of the present Code. Section 306 of the Code of 1882 provided that in default of the required deposit of 25 per cent. "the property shall forthwith be put up again and sold." In order XXI, rule 84, of the present Code the words are: "in default of such deposit the property shall forthwith be re-sold." It seems to us that the only possible reason for this change in the wording of the Code was to affirm the law in the sense in which it had been interpreted by other High Courts, as against the decision of this Court in *Amir Begam* v. *The Bank of Upper India, Limited* (1). As the Code now stands, the opening words of order XXI, rule 71, namely, "any deficiency of price which may happen on a re-sale by reason of the purchaser's default," are obviously wide enough to cover a default both in the making of the original deposit and in the subsequent payment of the balance due. We think, therefore that the ruling in *Amir Begam* v. *The Bank of Upper India, Limited* (1), whether that case was rightly or wrongly decided on the law as it then stood, is no longer applicable to the law as defined in the present Code of Civil Procedure. This was the view taken by the learned District Judge in the present case. He, consequently, overruled the decision of the first court on the one ground upon which that court had proceeded in rejecting

(1) (1908) I. L. R., 30 All., 278.

1922

SITA RAM
v.
JANKI RAM.

the application of Janki Ram. As there remained other matters for determination, he passed an order of remand under order XLI, rule 23, of the Code of Civil Procedure, sending the case back to the first court in order that the matter might be disposed of on the merits.

Sita Ram has brought the matter before this Court. He does not seem to have raised any question in the court below as to the right of the District Judge to entertain the appeal made to him by the judgment-debtor Janki Ram. In this Court he desires to raise the contention that no appeal lay from the decision of the first court, that of the Munsif of Rasra. In order to avoid any technical difficulty in the way of his raising this contention, he has described his application to this Court both as a first appeal from order and as an application in revision. If his contention is sound as to the absence of any right of appeal, then the learned District Judge in entertaining the appeal was exercising a jurisdiction not vested in him by law. We have thought it proper, therefore, to allow this question to be raised before us and to be argued out, although the point was not taken in the court below. Treating Sita Ram as an appellant in an ordinary first appeal from order, we may say that he has one decision in his favour, and that a decision by a Full Bench of this Court. The case in question is that of *Deoki Nandan Rai* v. *Tapesri Lal* (1). The decision was by a majority of three Judges out of four constituting the Full Bench, and one of the learned Judges who formed the majority concurred with the other two upon grounds which scarcely touched the main question in controversy. That decision expressly overruled a previous Full Bench decision of this Court in the case of *Ram Dial* v. *Ram Das* (2). It has since been considered by two other High Courts in India and expressly dissented from, vide *Amir Baksh Sahib* v. *Venkatachala Mudali* (3) and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (4). It seems to us also that in the Bombay High Court the view that an appeal lies in such cases as the present has been adopted without any question. It was assumed that both an appeal and a second appeal did lie in

(1) (1892) I. L. R., 14 All., 201.
(2) (1876) I. L. R., 1 All. 181.
(3) (1895) I. L. R., 18 Mad., 439.
(4) (1897) I. L. R., 25 Calc., 99.

the reported case of *Gangadas Dayabhai* v. *Bai Suraj* (1). In order, therefore, that the decision of this Court in *Deoki Nandan Rai* v. *Tapesri Lal* (2) might be further considered, this appeal was referred to a Full Bench of three Judges for consideration. We have come to the conclusion that the older decision of this Court was correct and that there is no adequate reason why this Court should continue, upon this question, to dissent from the view taken by the High Courts in Calcutta, Madras and Bombay. The reasons in favour of the view that an appeal lies can scarcely be stated better than they were by the learned Judges who pronounced the decision of this Court in *Ram Dial* v. *Ram Das* (3). Dealing with the analogous provisions of the Code of Civil Procedure of 1859, as amended by Act No. XXIII of 1861, the learned Judges held that there seemed no real difficulty about applying the rules governing executions of decrees, *mutatis mutandis*, to any proceeding taken against the defaulting purchaser, whether at the instance of the original decree-holder or of the judgment-debtor. They went on to say:—"The judgment-debtor and (if his claim be not satisfied out of the proceeds of the re-sale) the original decree-holder stand in the position of decree-holders who have obtained judgment against the defaulting purchaser for damages occasioned by his default. The defaulting purchaser stands in the position of a judgment-debtor against whom a decree for such damages has passed. They are parties to the proceeding which is substituted for the suit . . . and the rule relating to appeals must be applied, *mutatis mutandis*, equally with any other of the rules governing executions of decrees." In effect the view taken was that the adjudication, in a case like the present, between the judgment-debtor and the defaulting purchaser, amounts to a decree and that appeals lie under the provisions governing regular appeals from decrees. The position does not seem to be altered by any changes which have since been made in the law; if anything, the case in favour of the maintainability of an appeal is made a little stronger by the definition of the word "decree" in the Code of 1908, where it is expressly made to include the determination of any question

(1) (1911) I. L. R., 36 Bom., 329. (2) (1892) I. L. R., 14 All., 201.
(3) (1876) I. L. R., 1 All., 181.

1922

SITA RAM
v.
JANKI RAM.

within section 47 or section 144 of the said Code. In *Amir Baksh Sahib* v. *Venkatachala Mudali* (1) the learned Judges of the Madras High Court virtually based their decision upon the same line of reasoning, and it seems to us correct. We are of opinion, therefore, that an appeal lay to the learned District Judge in this case and that his decision on the points determined by him was correct. The order of remand was, therefore, justified under the circumstances, and it will be for the court of first instance finally and completely to determine as between the parties all the points raised by the application of Janki Ram and the objections preferred thereto on the part of Sita Ram.

We dismiss this appeal with costs.

WALSH, J. :—I entirely agree. If I were free so to hold I should hold that a suit was expressly excluded by the provisions of order XXI, rule 71. I am unable to frame, satisfactorily to my own mind, any cause of action as between a judgment-debtor and a defaulting purchaser. There is certainly no contractual relationship upon which a suit can be founded, and I am unable to see what the cause of action really is or could be. To suggest that it was intended by this rule to provide machinery for passing an order to meet the justice of the case which any party could immediately afterwards bring a suit to set aside, seems to me to pay rather an extravagant compliment to the subtlety of the compilers of the Code.

Appeal dismissed.

APPELLATE CIVIL.

1922
January, 3.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MUHAMMAD MUBARAK HUSAIN AND ANOTHER (OBJECTORS) v. SAHU BIMAL PRASAD (DECREE-HOLDER)*

Civil Procedure Code (1908), order XXI, rule 57—Execution of decree—Order dismissing application "for the present" but maintaining attachment—Fresh attachment not necessary.

By reason of the default of the decree-holder the court was unable to proceed with the execution of the decree and passed the following order :—"The execu

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*First Appeal No. 88 of 1921, from a decree of Kshirod Gopal Banerji, Subordinate Judge of Moradabad, dated the 15th of January, 1921.

(1) (1895) I. L. R., 18 Mad., 439.