Before Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

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February, 9.

BULAQI DAS AND OTHERS (DEFENDANTS) *v.* KESRI AND OTHERS (PLAINTIFFS) AND DWARKA PRASAD (DEFENDANT).*

Civil Procedure Code, section 47; *order XXI, rule* 92—*Execution of decree—Property included in sale certificate in excess of what was ordered to be sold—Suit for recovery of excess—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule* 1, *article* 12.

In execution of a decree for sale on a mortgage certain property, which was neither included in the mortgage in suit nor in the decree, in some unexplained manner found its way into the sale certificate. The decree-holder himself was the auction purchaser.

Held, on suit by the judgement-debtors to recover the property sold in excess of what ought to have been sold, that the suit was not barred by either section 47 or order XXI, rule 92 of the Code of Civil Procedure and, as the sale of the excess property claimed was a nullity, article 12 of the first schedule to the Indian Limitation Act, 1908, could have no application. *Thakur Barmha* v. *Jiban Ram Marwari* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

BOYS and IQBAL AHMAD, JJ. :—This defendants' appeal arises out of a suit for possession instituted under the following circumstances. Kalidin executed a mortgage, dated the 13th of June, 1873, in favour of the defendants Nos. 1 to 10, who later brought a suit on the basis of their mortgage, and brought some property to sale. A share was included in the sale which was not

*Second Appeal No. 988 of 1925, from a decree of D. C. Hunter, District Judge of Allahabad, dated the 12th of February, 1925, confirming a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Allahabad, dated the 29th of September, 1923.

(1) (1913) I.L.R., 41 Calc., 590.

included in the mortgage or in the decree. The decree-holders themselves purchased and obtained possession. The present suit was brought by the judgement-debtor to recover the excess sold.

The trial court gave the plaintiffs a decree, and the lower appellate court dismissed the defendants' appeal. The defendants again appeal to this Court.

It has been again contended for the appellants here, as it was in the courts below, that the suit is barred by section 47 of the Code of Civil Procedure, by order XXI, rule 92 of the Code of Civil Procedure, and by limitation. For the respondents, in addition to contesting that none of these pleas barred the suit, it has been further urged that the sale was in fact a nullity. We will proceed to consider first the plea of the appellants based on section 47 of the Code of Civil Procedure.

A large number of cases have been quoted to us on behalf of the appellants in support of their proposition that section 47 constituted a bar to the present suit.

It is, however, unnecessary for us to consider those cases in detail, for they can all be swept aside by one general criticism which covers them all, and that is that no case has been quoted to us in which the question has been definitely considered whether an auction-purchaser can be held to be the representative of a decree-holder for the purposes of section 47, and in which that question has also been definitely answered in the affirmative. The most that it has been possible to show on behalf of the appellants is that there have been some cases in which it was held that a proceeding came within section 47 to which only the judgement-debtor and the auction-purchaser were parties, but the effect of the absence of the decree-holder from the proceedings was not considered. It is only necessary to add that we ourselves can find no adequate reason of any sort for treating the

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auction-purchaser as a representative of the decree-holder, at any rate in the present proceeding. We hold, therefore, that section 47 did not constitute a bar to the present suit.

Next, does order XXI, rule 92, constitute a bar? It is clear that there are questions in which an auction-purchaser is involved which may come within the bar of rule 92; but it is not all questions in which an auction-purchaser is involved that come within that bar, but only those which come within the scope of one or other of the rules 89, 90 and 91. Of these three rules, we need only consider rule 90. It will be noted that when setting out above the facts of this case we did not state at what stage the mistake crept in. For the appellants it was admitted that the property which was included in the decree was only the property which was included in the mortgage. There was, therefore, no mistake in the decree. In the sale-certificate a share was included which was not included in the mortgage or in the decree. But we have no information at all as to whether the mistake first crept in the sale-certificate or whether it first appeared in the application for execution or whether it first appeared in the sale-proclamation. We specifically and in very clear terms asked counsel for the appellants what evidence there was to indicate at which of these three stages the mistake first occurred, and he told us in equally unmistakable terms that there was no evidence available —documentary or oral—on this point, and it was impossible to say from the record when and where the mistake occurred. At a later stage of the case, when endeavouring to establish that the suit was barred by rule 92 counsel found himself in some difficulty. Of the three rules 89, 90 and 91, he could only rely upon rule 90, and in examining the phraseology of that rule he found himself compelled to allege that the plaintiff had based his suit on a material irregularity or fraud in publishing

or conducting the sale. It was naturally difficult for him to establish this in face of the admission, which the material on the record compelled him to make, that there was no information at all as to when or how the mistake had occurred. He could only fall back upon paragraph 8 of the plaint which reads :

"Defendants Nos. 1 to 10 played this trick, that they alleged in the suit and the decree that the 4 annas, etc., share also includes an unmortgaged proportionate share of 6 pies. But they did not mention the unmortgaged 6 pies share and its proportionate share in the sale proceedings."

It is clear that in some circumstances the plaintiff might well be held bound by a statement in his pleadings, but into this particular statement we cannot read anything more than a general plea by the plaintiff that in some way or other more than the share mortgaged had been sold, and a natural belief in his mind that this mistake was due to some trick of the decree-holder. We are further confirmed in giving this and no more effect to the statement in paragraph 8 by the fact that the appellants themselves were constrained to admit before us that there is no evidence on the record at all as to how the mistake occurred, or at what stage it occurred. There was no issue on the point of fraud or relating to any trick of the decree-holder. We are again confirmed in our view as to the nature of the suit by the relief actually claimed. The plaintiffs asked in relief (*a*) that on the establishment of their rights in the excess share sold they may, on the dispossession of the defendants, be awarded proprietary possession. The relief asked for was not for the setting aside of the sale on the ground of fraud. We hold, therefore, that the suit was not barred by order XXI, rule 92.

The third plea raised on behalf of the appellants was that the suit was barred by article 12 of the Limitation Act. This plea is answered by a contention on behalf of

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the respondents that the sale was in fact a nullity, and that no question of limitation under article 12 could arise. With this latter view we agree. There was no prayer to have the sale set aside, nor was such prayer necessary. The plaintiff's case was straightforward and simple and may be stated as follows:—"The court has sold property of mine, with which the proceedings before it from the outset had no concern whatever. The court has no more power to do this than a private individual would have had. The whole proceeding is a nullity, and I am entitled to get back possession of my property."

We have been referred on behalf of the respondents to the decision of their Lordships of the Privy Council in *Thakur Barmha* v. *Jiban Ram Marwari* (1), and we think that that decision is in point. In that case the decree-holder had got certain property inserted in the sale-certificate in excess of that which had been sold, and their Lordships of the Privy Council refused all effect to the confirmation of the sale and the sale-certificate and all subsequent proceedings of the auction-purchaser. In view of our opinion that the sale of the excess share in this case was a nullity no question of limitation under article 12 can arise.

As a result of these findings on the above four points the appeal must fail and is dismissed with costs.

Appeal dismissed.

(1) (1913) I.L.R., 41 Calc., 590.