

## APPELLATE CIVIL.

1925  
November,  
17.

*Before Mr. Justice Sulaiman and Mr. Justice Mukerji.*

MUHAMMAD ZAKARIA (JUDGEMENT-DEBTOR) *v.* KISHAN NARAIN (DEGREE-HOLDER) AND MUHAMMAD HAFIZ AND OTHERS (JUDGEMENT-DEBTORS).\*

*Civil Procedure Code, section 47: order XXI, rule 66—Execution of decree—Sale proclamation—Order directing notification of alleged incumbrance on property to be sold—Appeal.*

No appeal will lie from an order passed in execution proceedings, at the instance of a stranger to those proceedings, directing the notification of an alleged incumbrance on the property proclaimed for sale.

THIS was an appeal from an order passed in execution proceedings in the following circumstances :

A mortgage decree for sale was in execution and a proclamation of sale was prepared and issued in the first instance under order XXI, rule 66. The date for the sale was fixed as the 9th of July, 1925. Three days before this date the respondent, Muhammad Hafiz, who was till then no party to the execution proceedings, filed an application in the execution court praying that a certain mortgage deed dated the 14th of September, 1910, in his favour be notified. An objection was raised on behalf of the judgement-debtor but the learned Subordinate Judge without deciding as to whether there was or was not any existing liability ordered that the notification asked for be issued.

The judgement-debtor appealed.

Pandit Gopi Nath Kunzru, for the appellant

\* First Appeal No. 315 of 1925 from a decree of Lakshmi Narain Tandon, Subordinate Judge of Agra, dated the 6th of July, 1925.

Pandit *Shiam Krishna Dar* and Munshi *Narain Prasad Asthana*, for the respondents.

The judgement of SULAIMAN, J., after setting forth the facts as above, thus proceeded :

A preliminary objection has been taken that no appeal lies. I am of opinion that this objection is well founded. Muhammad Hafiz was not a party to the execution proceedings. Neither the decree-holder nor the judgement-debtor admitted the validity of this prior mortgage. The contesting respondent intimated to the court that this mortgage should be notified. The order passed by the court was obviously under order XXI, rule 66, with a view to include in the proclamation of sale an incumbrance on the property. The validity of the mortgage was not considered by the court or decided by it. Any order passed by the court under rule 66, directing the way in which a proclamation of sale should be drawn up on application made, is not made appealable under order XLIII of the Code. *Prima facie* therefore no appeal would lie. The learned vakil for the appellant, however, has urged before us that inasmuch as this order was passed by an execution court and related to the execution of a decree it is appealable within the meaning of section 47. Section 47 must be read with section 2 and the effect of reading both the sections is not to make every order passed by the execution court appealable, but only such orders appealable as determine the rights of the parties to the execution with regard to all or any of the matters in controversy in suit. By this order neither the rights of the judgement-debtor nor of the decree-holder were determined by the execution court. No appeal therefore lies.

The learned vakil for the appellant has asked us to treat this appeal as an application in revision and interfere with the order.

1925

---

MUHAMMAD  
ZAKARIA  
v.  
KISHAN  
NARAIN.

1925

MUHAMMAD  
ZAKARIA  
v.  
KISHAN  
NARAIN.

Sulaiman,  
J.

Two objections have been raised. The first is that the court below should not have entertained an application from a person who was no party to the execution proceedings, and the second is that it was entertained at such a late stage as to prejudice the judgement-debtor. The application of the contesting respondent was made by way of an intimation to the court and the court was, under order XXI, rule 66, bound to show all incumbrances which *prima facie* existed on the property which was ordered to be sold. It is, therefore, impossible to hold that the court had no jurisdiction to take note of an alleged claim. If the notification merely informed the auction purchasers that there was a claim being put forward on behalf of Muhammad Hafiz on the basis of this old mortgage, which claim, however, was not admitted by the decree-holder or the judgement-debtor, then there was no harm in the notification. On the other hand if the notification amounted to any misstatement or misrepresentation, that may be a good ground for setting aside the sale, under order XXI, rule 90, as it would then amount to an irregularity.

Similarly, the fact that this amendment was made only a few days before the sale may be a ground for setting aside the sale if the judgement-debtor succeeds in establishing that substantial injury has been caused in consequence of the lateness of the order. That, too, is a matter which can be disposed of in the proceedings under order XXI, rule 90.

It is to be noted that pending this appeal the sale has actually taken place and any directions now made with regard to making the notification clear would be altogether useless and futile. I am, therefore, of opinion that it is impossible to interfere in

revision at this stage. I would therefore dismiss this appeal.

MUKERJI, J. :—I entirely agree that no appeal lies and that in the circumstances of this case I am not prepared to entertain the appeal as a revision from the order of the learned Subordinate Judge dated the 6th of July, 1925.

[After stating the facts, as above, the judgement continued :]

Now the question is whether an appeal is entertainable. As pointed out by my learned brother, it is not every question that arises between a decree-holder and a judgement-debtor that is appealable. In order that it may be appealable, it must be a decree and must come in section 2 of the Code of Civil Procedure. Be that, however, as it may, in this particular case, the decree-holder and the judgement-debtor were at one in attempting to defeat the claim of Muhammad Hafiz and others. It is clear, therefore, that by no stretch of imagination can the case be brought within the purview of section 2 and section 47 of the Code of Civil Procedure. No appeal, therefore, lies.

Coming to the question of revision I fail to see what irregularity has the Judge committed. The Judge was bound, in the interest of intending purchasers, to give them as much information as possible about the property which he was going to sell. If Muhammad Hafiz and others had a *bonâ fide* claim, it did not matter whether it was going to succeed or going to fail. The Judge could not enter into that intricate question. He was, in my opinion, bound to tell the intending purchasers that there was such a claim and that they might beware of it. The order,

1925

MUHAMMAD  
ZAKARIA  
D.  
KISHAN  
NARAIN.

1925

MUHAMMAD  
ZAKARIA  
v.  
KISHAN  
NARAIN.

therefore, was perfectly correct and it is not open to question by way of revision.

It has been urged upon us that the order was passed very late and that it was likely to frighten the intending purchasers. As may be guessed, the sale proclamation was issued long before the 6th of July, for the 9th of July had already been fixed for sale. If it be a fact that owing to the late notification of the claim, any intending purchaser has been frightened, not knowing clearly what was the matter, it would be a matter for the Subordinate Judge to inquire in a proceeding, if any has been taken, under order XXI, rule 90, of the Code of Civil Procedure. That has nothing to do with the case before us, at present.

I agree, therefore, that the appeal should be dismissed and there is no good ground for treating the appeal as a petition of revision.

BY THE COURT:—The appeal is dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Dalal and Mr. Justice Boys.*

EMPEROR v. JALAL-UD-DIN.\*

Act (Local) No. IV of 1910 (United Provinces Excise Act), section 10(2)—Excise Commissioner—Power of, to dismiss subordinate excise officer—Government of India Act, section 96B, (2)—Competence of Local Government to delegate powers—Sanction to prosecute.

The Local Government is competent to delegate to the Excise Commissioner its power to dismiss an Excise Inspector, and if the Commissioner, in the exercise of such delegated

\* Criminal Revision No. 409 of 1925, from an order of A. G. P. Pallan, Sessions Judge of Moradabad, dated the 6th of July, 1925.

1925  
November, .  
18.