

1925

FATEH  
SINGH  
v.  
GOPAL  
NARAIN  
SINGH.

[On receipt of the answer to the reference, the original Bench consisting of SULAIMAN and DANIELS, JJ., allowed this appeal and setting aside the order of the lower appellate court, restored the decree of the court of first instance with costs in all courts.]

*Appeal allowed.*

## APPELLATE CIVIL.

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June, 30.

*Before Mr. Justice Lindsay and Mr. Justice Sulaiman.*

AGHA HUSAIN AND OTHERS (APPLICANTS) v. QASIM ALI AND OTHERS (OPPOSITE PARTIES).\*

*Civil Procedure Code, section 47; order XXI, rule 92—Execution of decree—Sale confirmed—Subsequent amendment of decree no ground for setting it aside.*

In the absence of fraud or collusion, a sale in execution which has once been confirmed cannot be set aside because the decree under which it was held was at first incorrectly drawn up and has since been amended. *Patch Lal v. Sher Singh* (1), followed. *Prosumno Kumar Sanyal v. Kali Das Sanyal* (2), and *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (3), referred to.

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

Mr. S. A. *Haidar*, for the appellants.

Dr. *Kailas Nath Katju* and *Maulvi Mukhtar Ahmad*, for the respondents.

LINDSAY and SULAIMAN, JJ. :—These execution appeals arise out of an application which was made by certain judgement-debtors on the sole allegation that the decree was incorrectly prepared and had been subsequently amended, and the sale which took place in execution of the incorrect decree should be set aside.

\* First Appeal No. 26 of 1924, from a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 24th of October, 1923.

(1) Civ. Rev. No. 40 of 1924, decided on 30th of July, 1924,

(2) (1892) I.L.R., 19 Calc., 638.

(3) (1887) I.L.R., 10 All., 166.

There was no allegation of any fraud or collusion nor was there any denial of the fact that the interests of third parties had come in. It was not expressly stated in the application under what provisions of law it had been made, but the learned advocate for the appellants has stated before us that it purports to have been made under section 47, Civil Procedure Code. The learned Judge of the court below has declined to grant this application inasmuch as the judgement-debtors were parties to the proceedings in which the sale was confirmed.

In our opinion when the sale has been confirmed, although it had taken place in execution of a decree which was incorrectly prepared, the sale cannot be set aside simply because the decree has been subsequently amended. On the date when the sale took place there was a decree binding on the parties. As it stood, the execution of it was perfectly legal. The mere fact that it has subsequently been amended or set aside in appeal would not make the sale a nullity. We may refer to the case of *Fateh Lal v. Sher Singh* (1) in support of this view.

The learned advocate for the appellants relies on the Privy Council case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). It has, however, to be noted that in that case the allegations of the party wishing to have the sale set aside were that the attachment and the sale had been brought about by fraud and collusion on the part of the judgement-creditors and the auction-purchasers, though the charge had been perfectly vague. Under the old Code sales could not be set aside on the ground of fraud under section 311 but only under section 244 of the Code of Civil Procedure. The remedy of the aggrieved party, as pointed out by their Lordships, was obviously under

(1) Civ. Rev. No. 40 of 1924, decided on 30th of July, 1924.

(2) (1892) I.L.R., 19 Calc., 688.

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section 244, and therefore the mere fact that the purchaser, who was originally no party to the suit, was interested in the result did not matter. Under order XXI, rule 90, a sale can be set aside on the ground of irregularity as well as fraud. Obviously therefore, when a sale has been confirmed under rule 92, it no longer remains open to the judgement-debtor to challenge it under section 47. Furthermore, as we have said above, there is no allegation of any fraud at all in this case. Their Lordships of the Privy Council have in the case of *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1) held that if a wrong decree is passed by the court of first instance and the sale takes place in execution of it and a third party purchases the property, that sale cannot be set aside merely on the ground that that decree is subsequently reversed on appeal.

As third parties have purchased the property, it is no longer a matter relating to execution of a decree exclusively between the original parties to the suit. The order confirming the sale cannot be challenged in this way.

If the application be treated as an application for review of the order confirming the sale then no appeal lies from the order refusing to grant it. In this view of the matter these appeals fail and they are dismissed with costs.

*Appeal dismissed.*