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transfer was justified under section 8 of Bengal, N.-W. P. and Assam Civil Courts Act. The same principle applies when the transfer is made under section 22 to the court of a Subordinate Judge, the appeal being from an order of the Munsif.

I hold that the Subordinate Judge had jurisdiction to hear the appeal. This application, therefore, is without merits and fails and is hereby dismissed with costs.

APPELLATE CIVIL.

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July, 24.

Before Mr. Justice Sulaiman, Acting Chief Justice, and Mr. Justice King.

RAM KISHUN (PLAINTIFF) *v.* LALTA SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 47, 145; *order XXI, rules* 90, 92(3)—*Surety for performance of order of Court—"Party to suit"—Objections by surety to attachment and sale of his property—Confirmation of sale—Suit by surety directed against the sale, not maintainable*—Res judicata *in respect of execution proceedings.*

A surety for the performance of an order passed in execution proceedings executed a security bond hypothecating certain property and also personally binding himself in case the property proved insufficient. Enforcement of the surety's liability was at first attempted as against the hypothecated property, but for certain reasons it was given up and the court ordered enforcement against the person and other property of the surety. Accordingly a house belonging to him was attached and sold. After the sale he made an application purporting to be under order XXI, rule 90, of the Code of Civil Procedure, and another under section 47, both being on the ground that the house could not be sold unless and until the hypothecated property was sold first. Then he filed a suit for a declaration to the same effect and withdrew his applications, which were

*First Appeal No. 188 of 1925, from a decree of Kashi Nath, Additional Subordinate Judge of Cawnpore, dated the 23rd of March, 1925.

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accordingly dismissed and the sale confirmed. On the question whether the suit was maintainable, *held* :—

(1) Section 47 of the Code of Civil Procedure does not bar the suit because that section does not in terms apply to a surety, inasmuch as he is not a party to the suit. The effect of section 145 is that for purposes of appeal only he is deemed to be a party to the suit, and not that section 47 as a whole is applicable to him.

(2) When an order for execution is made against a surety under section 145, his position becomes that of a judgement-debtor. The proceedings taken against him are in the nature of execution proceedings and it is implied that he may make any objections which a judgement-debtor might make, though the mode in which they are to be made has not been expressly provided. If he raises objections to the sale and the objections are dismissed and the sale confirmed, he is bound by the orders passed against him and is not entitled to re-agitate the same questions by means of a separate suit. Such a suit is barred by the principle of *res judicata* and also by order XXI, rule 92(3).

(3) A suit for setting aside a sale may lie, even after confirmation of the sale, if the decree itself be attacked on the ground of want of jurisdiction or fraud. But where the ground of attack amounts only to an irregularity of procedure in execution, and not to want of jurisdiction, such a suit does not lie.

THE facts of the case are fully set forth in the judgements of the Court.

Maulvi *Iqbal Ahmad*, Mr. *B. Malik* and Babu *R. C. Ghatak*, for the appellant.

Dr. *K. N. Katju*, Munshi *Shambhu Nath Seth* and Munshi *Jagdish Behari Lal*, for the respondents.

SULAIMAN, A.C.J. :—This is a plaintiff's appeal arising out of a suit for a declaration that a certain house is not liable to be attached and sold in certain execution proceedings, and for a perpetual injunction restraining the principal defendants from taking any such proceedings.

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It appears that one Murtaza Khan obtained a decree for sale against Bandhan. In execution of the decree the mortgaged property was sold and purchased by Lalta Singh, defendant No. 1. This defendant deposited the money in court and Murtaza Khan withdrew the amount. Subsequently a minor, Ram Prasad, brought a suit for setting aside the sale, and got it held that the property did not belong to Bandhan. That judgement was affirmed on appeal. The property having gone out of the auction purchaser's possession, he applied for a refund of the amount of the purchase money. Murtaza Khan filed some objections but they were disallowed and he was ordered to repay it. While a revision on behalf of Murtaza Khan was pending, he obtained a postponement of the execution on the present plaintiff Ram Kishun standing as surety for the payment of the amount. Ram Kishun filed an unregistered security bond purporting to hypothecate another house. The deed further contained a covenant: "If the entire decree money cannot be recovered from the said property, I and my lawful representatives shall be liable for payment of the amount due." The revision was ultimately dismissed. Lalta Singh first tried to get the house, included in the security bond, sold. A warrant of attachment was issued but the amin reported that the boundaries did not tally, and that the person in actual occupation of the house claimed that it did not belong to Ram Kishun. After this the decree-holder applied on the 18th of March, 1924, that the surety had deceived the court and that the house purporting to have been hypothecated did not belong to him, and prayed that the court might order realization of the decretal money from the surety personally.

The court ordered a warrant to issue for the arrest of the surety. Several attempts were made but they all proved infructuous. In May, 1924, the court ordered

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the attachment of the house now in dispute. A copy of the order was duly served on the surety and attachment was effected. He did not appear to contest the order. The decree-holder then deposited expenses for sale, and notice under order XXI, rule 66 was issued to the surety for the purpose of drawing up the sale proclamation. Though it was duly served on him, he did not again appear, and his house was sold at auction. On the 20th of August, 1924, he filed an application purporting to be under order XXI, rule 90, for setting aside the sale on the ground that the decree-holder, without having taken any steps to get the property hypothecated sold, was not entitled to get the other property of the surety sold. Subsequently on the 26th of August, 1924, he filed an application purporting to be under section 47 of the Code of Civil Procedure for setting aside the sale on the same ground. While these applications were pending, the present suit for declaration was instituted on the 22nd of September, 1924. Then on the 29th of September, 1924, Ram Kishun's vakils stated before the court that they had no objection to the confirmation of the sale as they had filed a separate suit. The objections were accordingly dismissed and the sale was confirmed. Ultimately an appeal from that order was also dismissed by the District Judge.

In the reliefs claimed in the present suit there is no express prayer for setting aside the sale, although the sale had taken place before the suit was instituted. But there can be no doubt that the object of the suit is substantially to avoid the sale.

The main point urged on behalf of the plaintiff is that there was no personal liability of the surety to pay the money so long as it was not impossible to recover the amount from the property covered by the security bond.

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Section 47 of the Code of Civil Procedure cannot in terms apply to a surety. It applies to parties to the suit and their representatives. The surety was no party to the suit at all and came on the scene long after the decree was passed. Indeed he appeared when a dispute arose between the auction purchaser and the decree?holder. The application of the surety did not come strictly under section 47.

No doubt section 145 provides that when a person has become liable as a surety, the decree may be executed against him to the extent to which he has rendered himself personally liable, in the manner provided for the execution of decrees, but although the procedure for the execution is the same, it does not follow that he is deemed to be a party to the suit itself. The provision in the section which says that he shall for the purposes of the appeal be deemed a party within the meaning of section 47 shows clearly that he is not a party to the suit, although he is of course a party to that particular proceeding in the original court, and for purposes of appeal only he is deemed to be a party to the suit itself. But the effect of this section is not to make section 47 wholly applicable to a surety.

In the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur* (1) their Lordships of the Privy Council remarked that sections 47 and 144 apply only to the parties or the representatives of the original parties and do not apply to sureties. See also the cases of *Srinibash Prasad* v. *Kesho Prasad* (2), and *Ramanathan Pillai* v. *Doraiswami Aiyangar* (3).

It is thus clear that when no execution is being sought against a surety, he cannot be considered a party to the suit. It is also clear that if he executed a valid

(1) (1919) I.L.R., 42 All., 158 (136). (2) (1911) I.L.R., 38 Cal., 754 (766).
(3) (1919) I.L.R., 43 Mad., 325 (328).

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hypothecation bond as security, the charge could be enforced by a separate suit.

In the present case, however, no separate suit to enforce a charge could have been instituted. The security bond was an unregistered document and did not create a valid hypothecation. Furthermore, like the case before their Lordships of the Privy Council,—*Raj Raghubar Singh* v. *Jai Indra Bahadur* (1),—the bond before us does not hypothecate the property to any named mortgagee nor even to any officer of the court. Neither the decree-holder in his own right, nor as an assignee from an officer of the court, could have in a separate suit availed himself of the supposed security, as the deed did not bind the surety to any such person. The only way to enforce the unquestioned liability against the surety was by way of an order of the court against the surety that the money be realized by sale of his property. I am doubtful if in the case of an unregistered deed the court could have directed the sale of the property as if it were a charge. I am inclined to think that it would have had to attach the property mentioned in the security bond. But there can be no doubt that the court had ample jurisdiction to enforce the liability of the surety in an effective manner. The court did order execution to issue. It attached the surety's property. It ordered the sale to take place. The surety did not choose to come and represent to the court that the property should not be attached or sold. I am of opinion that if he wished to object to the execution proceedings against him, he ought to have appeared and shown cause.

Sulaiman, A. C. J.

The court was in no sense acting without jurisdiction. In the face of the amin's report, and in the absence of the surety, the court assumed that the decretal amount could not be recovered from the property mentioned in the security bond. The court had to decide this ques-

(1) (1919) I.L.R., 42 All., 158.

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tion, and even if it erred in its decision, it would still have jurisdiction to proceed with the execution. The surety does not deny his liability to pay the money. His only complaint is that the court should have proceeded against the property mentioned in the security bond and not the property which has been sold. At best his objection is that the attachment of the second property was improper. This plea is based on the ground that the court erred in holding that the amount could not be recovered from the secured property. Putting the case at its highest in favour of the surety, the court only committed an error of judgement which would be a mere irregularity in the execution proceedings. An order passed against him by a competent court, even though in pursuance of some irregularity, is not a nullity but is binding upon him. He cannot have it set aside by another court in a separate suit.

No doubt his complaint that the court should not attach the other property did not fall under order XXI, rule 90, for that rule is confined to a material irregularity or fraud in publishing or conducting the sale. He did raise the point in both his applications dated the 20th of August and the 26th of August, 1924, and that point was decided against him by the execution court and the appellate court. Indeed his legal advisers thought it best not to press the objections at all. That rule undoubtedly applies to cases of irregularity or fraud covered by rules 89, 90 and 91.

If order XXI, rule 92, sub-clause (3) were taken literally, no suit would ever lie to set aside an order confirming a sale where any application under rules 89, 90 or 91 has been disallowed or not made at all. I am inclined to think that this rule cannot be understood in that wide and comprehensive sense. When the decree itself is being attacked on account of want of jurisdic-

tion, or even on account of fraud, undue influence or coercion, as distinct from any irregularity or fraud in the sale, I think a separate suit undoubtedly lies.

It does not however follow that, where it was open to the surety to raise objections to the attachment of his property before the court lawfully seized of the matter, and he has failed to raise such objections, or his objections have been disallowed, the sale which is effected under the order of such court is liable to be set aside in a separate suit, even though a third party has purchased the property at auction.

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Section 11 of the Code of Civil Procedure which embodies the principle of *res judicata*, applies strictly to two separate suits, but it has been held that that section is not exhaustive, but the principle underlying it applies to orders passed in execution in the same suit: *Ram Kirpal* v. *Rup Kuari* (1), *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2), and *Raja of Ramnad* v. *Velusami Tevar* (3).

A judgement-debtor is defined in section 2, sub-clause (10), as any person against whom a decree has been passed or an order capable of execution has been made. By virtue of section 145, when an order for execution is made against a surety, he certainly becomes a judgement-debtor and the proceedings taken against him are in the nature of execution proceedings.

If an order in execution is passed without jurisdiction, it cannot be impugned in proceedings under rule 90, and the confirmation of the sale may not be an absolute bar. But here it is a case not of want of jurisdiction but of mere irregularity, and the orders passed against the surety by a competent court must be deemed to be final.

(1) (1883) I. L. R., 6 All., 269. (2) (1881) I. L. R., 8 Cal., 51.
(3) (1920) L. R., 48 I. A., 45.

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I am, therefore, of opinion that he is bound by the order passed against him for issue of execution for attachment and the confirmation of the sale, and it is not open to him to go behind them and impugn them in a separate suit. I would therefore dismiss the appeal.

Sulaiman, A. C. J.

KING, J. :—I agree that the appeal should be dismissed. The plaintiff appellant sued for a declaration that a certain house could not be attached and sold in execution of a certain decree, and for a perpetual injunction restraining the defendants from taking any proceedings against the house in execution of the decree. In view of the fact that the house had been not merely attached, but even sold, long before the institution of the suit, it would have been futile to grant the injunction. The plaintiff was not entitled to claim a mere declaration in the terms prayed, without asking for the consequential relief that the sale be set aside. I think the court would have been justified in refusing relief on these grounds alone. The plaintiff had not suffered any injustice in being compelled to discharge a liability which he voluntarily undertook.

The appeal does, however, raise some difficult questions of law. The first point is whether the execution court was lawfully empowered to sell the house in suit without having first attempted to sell the hypothecated house.

The security bond purported to hypothecate a house No. 103/258 as security for the decree money. The surety undertook a personal liability for the said sum in case it could not be recovered from the hypothecated property. This bond could not be enforced by a mortgage suit for several reasons. The bond was unregistered, and therefore did not serve to create a mortgage. I think it could not even be held to create a charge. In any case it did not purport to create a mortgage or charge

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in favour of any specified person. So even if it were not totally ineffective for want of registration, it could only be enforced by the court making an order for the sale of the property unless the surety paid the decree money: See *Raj Raghubar Singh* v. *Jai Indra Bahadur* (1). This was in fact the procedure which the court first contemplated. The court issued a warrant for the attachment of the hypothecated house. The amin reported that the boundaries of house No. 103/258 do not tally with the boundaries mentioned in the bond and that the house is in the possession and ownership of another person. The decree-holder himself confirmed this report. It appeared, therefore, that the surety had practised a fraud upon the court by purporting to hypothecate a house in which he had no interest whatever. In these circumstances, I think the court was perfectly justified in finding that the money could not be realized by sale of the hypothecated house and in proceeding to enforce the surety's personal liability under section 145 of the Code of Civil Procedure by attachment and sale of the house in suit.

The surety had notice of the attachment, and he made no objection. He had notice of the sale proclamation, and he kept silent. After the house had been duly sold the surety at last came forward with objections purporting to be made under order XXI, rule 90 and section 47. Before the objections could be decided he instituted this suit. After instituting the suit his vakil stated to the execution court that he did not wish to press the objections. The objections were accordingly dismissed and the sale confirmed. He even appealed against the order of confirmation but the appeal was dismissed.

On these facts is the suit maintainable? The suit is not expressly barred by section 47, since the surety is

(1) (1919) I. L. R., 42 All., 158 (167)

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certainly not a party to the suit. He is undoubtedly a "judgement-debtor" within the meaning of the Code of Civil Procedure, since he is a person against whom an order capable of execution has been made. Under section 145 the order may be executed against him in the manner provided for the execution of decrees. This apparently means that he is to be treated as a judgement-debtor for the purpose of proceedings under order XXI. It is also laid down that he shall "*for the purposes of appeal* be deemed a party within the meaning of section 47". I confess that I find great difficulty in interpreting these words. Apparently they mean that he is deemed to be a party within the meaning of section 47 for the purposes of appeal only and not for any other purpose. The maxim *Expressio unius est exclusio alterius* seems clearly applicable. Probably the meaning is that when an order is made by the execution court against a surety then the order shall be deemed to have been made under section 47 and to be a "decree" and therefore appealable. But this implies that questions relating to the execution of the decree may be determined by the execution court and not by separate suit. It also implies that the surety may make any objection which a judgement-debtor might make. Otherwise the execution court could not determine the questions. Under what rule or section is he to make objections? Supposing he objects to attachment, he cannot make his objection under order XXI, rule 58. Rules 58 to 63 must be read together and are clearly meant to provide for objections by outsiders and not to objections by judgement-debtors. Section 47 does not apply, since the surety is not a party to the suit and is only deemed to be such "for the purposes of appeal". The position is very anomalous. The surety is certainly a party to the execution proceedings, being in the position of a judgement-debtor. The legislature apparently in-

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tends that he should be able to make objections in the court of execution proceedings, but does not make any express provision for such objections. It seems that we have to fall back upon the "inherent powers" of the court to receive and decide objections made by the surety.

King, J.

In any case we are faced by the difficulty that there is nothing in the Code providing that questions relating to the execution *must* be determined by the execution court and not by a separate suit. The surety is apparently at liberty to ignore the execution court and to institute a separate suit for the reliefs which he claims. I agree that the terms of section 47 do not bar the present suit.

The question then arises, when the surety does raise objections to the sale and when the execution court dismisses the objections and confirms the sale, and the order of confirmation is upheld in appeal (as in the present case), is the surety nevertheless entitled to treat these adverse decisions as a nullity and to re-agitate the same questions by instituting a separate suit?

I think the suit is barred by the principle of *res judicata* and also by order XXI, rule 92(3).

The suit is not barred in express terms by section 11, but we have the authority of the Privy Council for holding that section 11 is not an exhaustive statement of the application of the principle of *res judicata*. The principle applies to decisions made by a court in the course of execution proceedings: *Ram Kirpal* v. *Rup Kuari* (1). On this principle the decision of the execution court dismissing the surety's objections to the sale of the house, which decision was upheld in appeal, is binding upon the surety and bars this suit.

Order XXI, rule 92(3) also bars the suit in my opinion. The surety made an objection which purported to be made under order XXI, rule 90. This objection

(1) (1883) I. L. R., 6 All., 269.

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was dismissed as it was not pressed, and the sale was confirmed. The real aim of this suit is to set aside the order confirming the sale, and such a suit seems to be clearly barred by order XXI, rule 92(3). I have already mentioned that the plaintiff did not expressly claim the relief of setting aside the order of confirmation, probably because such a suit was *prima facie* barred by rule 92(3). Hence he asked for a mere declaration that the property could not be sold, although it would have been futile to grant such a declaration without granting also the consequential relief of avoiding the sale.

King, J.

I am not prepared to hold that an order confirming a sale under order XXI, rule 92(1) is an absolute bar to a separate suit for setting aside the sale on any ground whatever, as for instance on the ground that the decree itself is vitiated by want of jurisdiction or fraud. In the present case at least no such defect can be imputed to the decree. The surety's only complaint was that the execution court proceeded to enforce his personal liability without first attempting to attach and sell the hypothecated house. The court had good reason to suppose that any such attempt would be wholly infructuous. At the very most, therefore, the court was guilty of irregularity of procedure and certainly did not act without jurisdiction in selling the house in suit. I concur with my learned brother in dismissing the appeal.

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