

become time barred. The suggestion that the decrees held by the appellants either in the present appeal or in the connected appeal have become time barred has not been substantiated and we have not, therefore, allowed that suggestion to influence our decision.

1932

AMEER LAL
v.
RAMGOPAL
MADHO-
PRASAD.

It is not disputed that the figures worked out by the court below are correct. The result, therefore, is that we affirm the decision of the court below and dismiss this appeal with costs.

Before Mr. Justice Niamat-ullah and Mr. Justice Kisch

RAM CHARAN (DECREE-HOLDER) v. PARMESHWARI DIN
(JUDGMENT-DEBTOR) *

1932
December, 8.

Civil Procedure Code, section 47; order XXI, rule 97—Transfer of Property Act (IV of 1882), section 52—Pendente lite transfer by mortgagor—Final decree for foreclosure—Decree executed against mortgagor for possession—Decree can be executed again against the transferee pendente lite.

During the pendency of a suit for foreclosure the mortgagor defendant made a usufructuary mortgage to a stranger and then sold to him the equity of redemption. Subsequent to this the plaintiff applied for a final decree, impleading the transferee but later on discharging him. In execution of the final decree the plaintiff obtained delivery of possession against the mortgagor. Failing, however, in the mutation proceedings to get his name entered in place of that of the transferee, the plaintiff applied to execute his decree again, praying for delivery of possession as against the transferee.

Held that the rights of the decree-holder, namely to extinguish the right of redemption and to obtain possession of the mortgaged property, could not be affected by the transfers *pendente lite* and he was entitled to execute the final decree not only against the mortgagor but equally as against the transferee *pendente lite*. The execution taken out against the mortgagor turned out to be infructuous and was not a complete execution of the decree; so the decree-holder was entitled to maintain a second application for execution against

* First Appeal No. 462 of 1931, from a decree of Priya Charin Agarwal, Subordinate Judge of Cawnpore, dated the 30th of June, 1931.

1932

RAM
CHARAN
v.
PARMESH-
WARI DIN.

the transferee and was not bound to come, nor did he profess to come, with an application under order XXI, rule 97 of the Civil Procedure Code. *Held*, also, that the controversy being between the decree-holder and a representative of the judgment-debtor, and being one relating to the execution of the decree, the matter was to be decided not by a separate suit but by the execution court under section 47 of the Civil Procedure Code.

Dr. K. N. Katju and Mr. Bankey Behari, for the appellant.

Messrs. P. L. Banerji, and Basudeva Mukerji, for the respondent.

NIAMAT-ULLAH and KISCH, JJ. :—This is a decree-holder's appeal and arises in the following circumstances. The appellant was a mortgagee under a deed executed by one Nurul Hasan and instituted a suit in 1923 for the enforcement of his mortgage by foreclosure, and obtained a preliminary decree *ex parte*. Subsequently the *ex parte* decree was set aside and after contest another preliminary decree for foreclosure was passed on the 30th of September, 1924. During the pendency of the foreclosure suit Nurul Hasan executed a deed of usufructuary mortgage in favour of the respondent, Parmeshwari Din, on the 15th of February, 1924. Subsequently, on the 25th of February, 1928, Parmeshwari Din purchased Nurul Hasan's equity of redemption in execution of a simple money decree. The appellant made his application for final decree some time after the 25th of February, 1928, mentioning Parmeshwari Din as one of the opposite parties in the heading of his application. On the 28th of July, 1928, when the application was heard, he discharged Parmeshwari Din, and the court recorded an order to that effect. A final decree for foreclosure was passed on the same day. The decree-holder obtained delivery of possession against Nurul Hasan on the 29th of March, 1929, in execution of his decree. In the mutation proceedings which followed, disputes

arose between the appellant and Parmeshwari Din, who had obtained entry of his name in the record of rights. Apparently, the decree-holder was unsuccessful in having the name of Parmeshwari Din expunged. Thereupon, he made a second application for execution of decree on the 21st of August, 1930, praying that delivery of possession be made as against Parmeshwari Din, who is bound by the final decree passed against Nurul Hasan, he being a transferee *pendente lite*. Parmeshwari Din objected to any proceedings in execution being taken against him. His principal pleas were that as he was no party to the foreclosure decree, no execution could be taken out against him, and that the decree having been once executed, a second execution was not permissible. It was also contended that an application of the kind made by the appellant was not maintainable and that his only remedy was to institute a regular suit. This last mentioned plea found favour with the lower court. Accordingly, the appellant's application was dismissed, and he was directed to seek his remedy by a regular suit.

1932

 RAM
 CHARAN
 v.
 PARMESH-
 WARI DIN

The learned advocate for the appellant argued that Parmeshwari Din, having taken a mortgage and having purchased the equity of redemption of Nurul Hasan during the pendency of the foreclosure suit, was bound by the decree which was eventually passed against his transferor Nurul Hasan, and that the transfers in his favour cannot affect the appellant's rights under the decree to any extent.

We are clearly of opinion that this contention is sound. Section 52 of the Transfer of Property Act lays down that during the active prosecution in any court of a contentious suit in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except

1932

RAM
CHARAN
v.
PARMESH-
WARI DIN

under the authority of the court and on such terms as it may impose. It is not suggested that permission of the court was obtained for either of the two transfers in favour of Parmeshwari Din. It cannot be doubted that the foreclosure suit was a contentious one. It is equally undeniable that the mortgaged property was directly and specifically in question in the foreclosure suit. It is clear that the transfers taken by Parmeshwari Din cannot in any manner affect the rights of the decree-holder, the appellant before us. One of his rights under the decree in the foreclosure suit was to extinguish Nurul Hasan's right of redemption and to obtain actual possession of the mortgaged property. If Parmeshwari Din's objection as regards the appellant's right to take possession in execution of his decree be allowed to prevail, his (the decree-holder's) rights under the foreclosure decree would be materially affected. In this view the appellant was entitled to execute his decree not only against Nurul Hasan but also his transferee *pendente lite*, Parmeshwari Din.

A number of technical objections have been raised before us. First, it is contended that section 47 of the Code of Civil Procedure does not apply, and consequently the order of the lower court cannot be the subject of an appeal to this Court. In our opinion this contention has no force. That Parmeshwari Din is a representative in interest of Nurul Hasan can admit of no doubt. The question arises between the decree-holder on the one side and the representative of the judgment-debtor on the other. The controversy between the parties is clearly one relating to the execution of decree. In fact the appellant's application for execution of decree was resisted by the respondent. We think that section 47 of the Code of Civil Procedure is fully applicable and that an appeal to this Court is competent.

It was argued that the respondent, though a transferee *pendente lite*, had a right of redemption by virtue

of transfers made in his favour, though *pendente lite*, and that he should not have been discharged after being impleaded in the application for a final decree. Reference is made to order XXXIV, rule 3 of the Code of Civil Procedure. We think that order XXXIV, rule 3 of the Civil Procedure Code should not be read independently of other provisions of the law. When read with section 52 of the Transfer of Property Act, there can be no doubt that a final decree passed against Nurul Hasan is as effective against his transferee *pendente lite* as against himself. The transferee could have redeemed even though he was no party. He did not avail himself of the opportunity and the final decree extinguished not only the rights of Nurul Hasan, but also the rights of his transferee *pendente lite*.

It is next argued that the appellant having taken out execution of his decree against Nurul Hasan and having obtained delivery of possession against him, the decree should be deemed to have been completely executed, and no further execution proceedings can take place. The appellant's application is said to be virtually one under order XXI, rule 97 of the Code of Civil Procedure, that is, an application by a decree-holder who is obstructed in taking possession of the property in respect of which a warrant for delivery of possession has been executed. We do not think this argument is sound. The decree has not been fully and effectively executed. There can be no doubt that the decree-holder could have, in the first instance, applied for execution not only against Nurul Hasan but also against his transferee *pendente lite*. Had he done so, there could be no argument against the maintainability of such application so far as Parmeshwari Din was concerned. The position cannot be materially different if an application was made in the first instance only against Nurul Hasan; and when the decree-holder subsequently discovered that the execution taken out against Nurul Hasan was infructuous, he applied for

1932

RAM
CHAMAN
v.
PARMESH-
WARI DIN

1932

RAM
CHARAN
v.
PARNESH-
WARI DIN

execution of his decree under order XXI, rule 11 of the Code of Civil Procedure against the respondent, who should as much be considered to be the judgment-debtor as Nurul Hasan himself. We are clearly of opinion that the execution taken out against Nurul Hasan was not a complete execution of the decree. Reference was made to two Full Bench cases, *Bhagwati v. Banwari Lal* (1), and *Gaya Bakhsh Singh v. Kuar Rajendra Bahadur* (2). Both these cases refer to the right of an auction purchaser to apply for delivery of possession after he was actually delivered possession but was obstructed by a judgment-debtor or his representative. It was held in both those cases that the auction purchaser's application was one under section 318 of the Code of Civil Procedure of 1882, or order XXI, rule 97 of the Code of 1908. The position of an auction purchaser is different from that of a decree-holder. The former is not the holder of a decree capable of execution but is merely entitled to delivery of possession under order XXI, rule 95, on the strength of his sale certificate. The decree-holder on the other hand is entitled to execute his decree, that is, he can secure all the advantages which the decree confers upon him. In this case the decree-holder is entitled to recover possession from the transferee. As we have already pointed out, the appellant's application is an application drawn up under order XXI, rule 11 of the Code of Civil Procedure and is not an application under order XXI, rule 97. His application for execution is within limitation, and there is no reason why it should be treated as an application under order XXI, rule 97. We hold that neither of the two cases referred to above has any application and that the appellant was entitled to maintain a second application for execution against Parmeshwari Din.

In the view of the case we have taken, this appeal succeeds. It is accordingly allowed. The order of the

(1) (1908) I.L.R., 31 All., 82.

(2) (1927) I.L.R., 3 Luck., 182.

lower court is set aside. It shall deliver possession to the appellant as against the respondent, as prayed for in his application for execution. The appellant shall have his costs in both courts.

1932

RAM
CHAMAN
v.
RAMNESH-
WARA DIN

REVISIONAL CIVIL

*Before Sir Lal Gopal Mukerji, Acting Chief Justice,
and Mr. Justice Thom*

MADHO PRASAD VYAS (CREDITOR) v. MADHO PRASAD
(OFFICIAL RECEIVER) *

1932

December, 9

Provincial Insolvency Act (V of 1920), sections 27, 43, 75—

Time specified within which to apply for discharge—Power to extend time even after expiry thereof—Revision of order under Provincial Insolvency Act.

Where an order of adjudication under the Provincial Insolvency Act has been made and a time has been fixed within which the insolvent has to apply for his discharge, the court has power to extend the time even after the expiry of the period originally fixed.

Where an appellate order passed in insolvency proceedings was sought to be revised under section 115 of the Civil Procedure Code, it was held that the proper section under which to entertain the petition was section 75 of the Provincial Insolvency Act.

Mr. N. Upadhiya, for the applicant.

Mr. Gadadhar Prasad, for the opposite party.

MUKERJI, A. C. J., and THOM, J.:—This is an application which purports to have been made under section 115 of the Code of Civil Procedure. It arises out of insolvency proceedings and therefore we think that the proper section under which to entertain this petition is section 75 of the Insolvency Act, and we accordingly do so.

It appears that a firm, Murlidhar Mangilal, was actually declared insolvent on the 30th of May, 1929, and two years' time was allowed by the order to apply