

necessary to express any opinion as to the soundness of the decision in that case as the point involved there was different from the one which arises before us.

For the reasons given above we dismiss this appeal. We make no order as to the costs of this appeal as the respondents have not appeared.

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 DWARKA  
DAS  
v.  
GODHANA

*Before Mr. Justice Bennet and Mr. Justice Verma*

RAHIM BAKHSH (PLAINTIFF) *v.* KISHEN LAL AND ANOTHER  
(DEFENDANTS)\*

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 December, 19

*Civil Procedure Code, section 47; order XXI, rule 92—Execution of decree for sale on mortgage—Property, not mortgaged, wrongly included in sale proclamation and sale certificate—No objections raised by judgment-debtor—Suit for recovery of the excess property against decree-holder auction-purchaser—Maintainability.*

In execution of a decree for sale on a mortgage some property belonging to the judgment-debtor which did not form part of the mortgaged property was by mistake included in the sale proclamation, the sale, and the sale certificate. No objection was taken by the judgment-debtor at any of these stages of execution. Subsequently he brought a suit for recovery of this property against the auction purchaser, who was the decree-holder himself: *Held*, that the judgment-debtor should have proceeded by way of objections in the execution court, and his suit was barred by section 47 and order XXI, rule 92 of the Civil Procedure Code.

Mr. K. C. Mukerji, for the appellant.

Mr. K. C. Mital, for the respondents.

BENNET and VERMA, JJ.:—This is a second appeal by the plaintiff against a decree of the lower appellate court dismissing his suit. The following pedigree is relevant:

AMIR BAKHSH  
(died 50 years ago)

Azim-Uddin  
(deceased)  
married  
Mst. Saliman  
(defendant 2)

Wazir  
(deceased)

Saini  
(deceased)

Rahim Bakhsh  
(plaintiff)

\*Second Appeal No. 209 of 1936, from a decree of N. L. Singh, Second Civil Judge of Saharanpur, dated the 2nd of November, 1935, reversing a decree of Bijepal Singh, Munsif of Haveli, dated the 5th of May, 1934.

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Azim-uddin executed a simple mortgage in favour of defendant 1, Kishen Lal. After the death of Azim-uddin his property, which was one-fourth of the property of his father, was inherited by his widow Mst. Saliman, and his brother Rahim Bakhsh, the plaintiff. The defendant 1, Kishen Lal, then brought suit No. 274 of 1927 against the plaintiff and defendant 2, Mst. Saliman, as the legal representatives of Azim-uddin, the mortgagor, and the suit was for sale on the simple mortgage of the property, the one-fourth share of Azim-uddin which had been mortgaged. The court passed a decree for the sale of the mortgaged property. In the sale proclamation the mortgaged property was entered for sale, and the one-quarter share which belonged to Rahim Bakhsh personally and which he had inherited from his father was also wrongly entered for sale as part of the property mortgaged by Azim-uddin. No objection was taken by the plaintiff as a judgment-debtor to this incorrect description in the sale proclamation and no objection was taken at the time of sale and no objection was taken when the sale was confirmed and a certificate was granted to the decree-holder, Kishen Lal. When Kishen Lal applied for mutation, the plaintiff states that he became aware of what he calls a fraud and he made an objection to the mutation which was dismissed. The sale had been previously confirmed, and the plaintiff then filed the present suit without making any application to the execution court for correction of the sale certificate. The trial court granted a decree to the plaintiff, finding that the share of the plaintiff had been incorrectly included in the sale certificate. The lower appellate court agrees that the sale certificate incorrectly included property belonging to the plaintiff inherited from his father, but the lower appellate court holds that there is no right of suit to the plaintiff because his objection should have been taken in the execution court under the provisions of section 47 of the Civil Procedure Code and order XXI, rule 66 and rule 92. The

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suit of the plaintiff therefore is barred. The lower appellate court has referred to the decision in *Seth Chand Mal v. Durga Dei* (1), a Full Bench ruling of five Judges. In that case the judgment-debtor died after the passing of the decree, and his legal representatives were brought on the record in execution proceedings to represent him. It was held that the questions which they raised as to property which they said did not belong to his assets in their hands, and as such was not capable of being taken in execution, were questions coming under section 244(c) of the Civil Procedure Code of 1882 and must be determined in the execution department and not by separate suit. This ruling has been followed in numerous cases, one of which is *Imtiaz Bibi v. Kabia Bibi* (2). Learned counsel referred to a ruling of a Bench of this Court, *Bulaqi Das v. Kesri* (3). In that case certain property was included in a sale on a simple mortgage decree, which should not have been included. The Court held that the judgment-debtor could bring a regular suit to recover the excess property sold and that such a suit was not barred by section 47 of the Civil Procedure Code or order XXI, rule 92 of the Civil Procedure Code. No mention in the ruling is made of the Full Bench ruling, *Seth Chand Mal v. Durga Dei* (1). Reference is made to a ruling of their Lordships of the Privy Council, *Thakur Barmha v. Jiban Ram Marwari* (4). That ruling was on appeal from orders in the execution department and was no authority for the proposition that a regular suit would lie by way of objection to an incorrect sale certificate. We therefore follow the Full Bench ruling of this Court and we dismiss this second appeal with costs.

(1) (1889) I.L.R. 12 All. 313.

(2) (1929) I.L.R. 51 All. 878.

(3) (1928) I.L.R. 50 All. 686.

(4) (1913) I.L.R. 41 Cal. 590.