

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice
Bisheshwar Nath Srivastava.

MUSAMMAT INDRANI (JUDGMENT-DEBTOR-APPLICANT)
v. BABU BIMLA PRASAD (DECREE-HOLDER-RESPONDENT).*

1929
November, 8.

Civil Procedure Code (Act V of 1908), section 47 and order XXI, rules 66(2) and 90—Execution of decree—Determination of value of attached property for being entered in the sale proclamation, whether amounts to the determination of a question within section 47—Order determining the value, if amounts to a decree—Appeal against the order determining the value of the property for sale, whether lies—Judgment-debtor's power to have sale set aside if under-valuation results in injury to him.

An order of the executing court determining the value of the property attached for being entered in the sale proclamation is not the determination of any question within section 47 of the Code of Civil Procedure, and that order is not a decree within the meaning of sub-section (2) of that section and is not appealable as such nor is that order appealable as an order under any provision of the Code of Civil Procedure. *Sivagami Achi v. Subramania Ayyar* (1); *Ajudhia Prasad v. Gopi Nath* (2); *Deoki Nandan Singh v. Bansi Singh* (3); *Panch Daur Thakur v. Mani Raut* (4); and *Deokinandan Singh v. Raja Dhakeswar Prasad Narain Singh* (5), relied on.

If the alleged under-valuation results in any substantial injury to the appellant when the sale of his property takes place, he shall have a right to get an order setting aside the sale under rule 90 of order XXI of the Code of Civil Procedure. Before such a contingency happens the rules of procedure do not entitle the appellant to question the propriety of the statement as to the value of the property which the court has directed to be made in the proclamation of sale. *Saadatmand Khan v. Phul Kuar* (6) relied on.

*Execution of Decree Appeal No. 93 of 1929, against the order of Babu Gauri Shankar Verma, Subordinate Judge of Sitapur, dated the 11th of May, 1929.

(1) (1908) I. L. R., 27 Mad., 259.

(2) (1917) I. L. R., 39 All., 415.

(3) (1911) 16 C. W. N., 124.

(4) (1912) 16 C. W. N., 970.

(5) (1916) 2 P. L. J., 13.

(6) (1898) L. R., 25 I. A., 146.

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Mr. *Khaliq-uz-zaman*, for the appellant.

Mr. *Haider Husain*, for the respondent.

HASAN and SRIVASTAVA, JJ. :—This is the judgment-debtor's appeal from the order of the Subordinate Judge of Sitapur, dated the 11th of May, 1929.

The relevant circumstances are as follows :—

In execution of a decree against the appellants held by the respondent a certain immoveable property was attached and now steps are being taken for its being sold by public auction. Consequently a sale proclamation is being prepared and particulars required by sub-rule (2) of rule 66 of order XXI of the Code of Civil Procedure are being enquired into for the purpose of their being specified in the proclamation of sale. One of these particulars is the estimated value of the property sought to be sold. The court seized of the execution proceedings issued a commission for the purpose of ascertaining as far as possible the value of the property mentioned above. The Commissioner has made his report as to the valuation. The respondents accepted the valuation given by the Commissioner but the appellant raised objections in respect of it. The objections were not supported by evidence. The result was that the court rejected the objections and accepted the valuation as found by the Commissioner. From the order just now mentioned the present appeal has been preferred.

At the hearing of the appeal a preliminary objection was taken on behalf of the respondents. It is argued that the order under appeal is not "the determination of any question within section 47" of the Code of Civil Procedure, and if it is not so, the order is not a decree within the meaning of sub-section 2 of the same Code. It is agreed that the order in question is not appealable as an order under any provision of the Code of Civil Procedure. The question,

therefore, for decision is as to whether it is a determination of any question within section 47.

It appears to us that the preliminary objection is supported by a preponderance of decisions of several High Courts in India, *vide Sivagami Achi v. Subramania Ayyar* (1); *Ajudhia Prasad v. Gopi Nath* (2); *Deoki Nandan Singh v. Bansi Singh* (3); *Panch Dwar Thakur v. Mani Raut* (4); *Deokinandan Singh v. Rajah Dhakeswar Prasad Narain Singh* (5). These decisions give various reasons in support of the view that a question of the nature decided by the order under appeal is not a question within the meaning of section 47 of the Code of Civil Procedure, but the one reason which appeals to us most is that the judgment-debtor is not left without any remedy if the order in question results in any injury to him. In *Saadatmand Khan v. Phul Kuar* (6) their Lordships of the Judicial Committee have definitely held that when value of the property sought to be sold is stated in the proclamation of sale it is a statement of a material fact and that a misstatement as to the value of the property in the sale proclamation "is something more grave than an ordinary irregularity of procedure, but the fact that it is so, and that it was made gratuitously by the decree-holder and the Court, does not prevent it from being 'a material irregularity in publishing or conducting' the sale, such as to bring the case within the special remedy provided by section 311." If, therefore, the alleged under-valuation results in any substantial injury to the appellant when the sale of his property takes place, he shall have a right to get an order setting aside the sale under rule 90 of order XXI of the Code of Civil Procedure. Before such a contingency happens we are of opinion

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(1) (1903) I. L. R., 27 Mad., 289.

(2) (1917) I. L. R., 39 All., 415.

(3) (1911) 16 C. W. N., 124.

(4) (1912) 16 C. W. N., 970.

(5) (1916) 2 P. L. J., 13.

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that the rules of procedure do not entitle the appellant to question the propriety of the statement as to the value of the property which the court has directed to be made in the proclamation of sale by the order under appeal. It may be pointed out that the proviso added to rule 90 mentioned above by this Court will be no bar in the appellant's way to questioning the misstatement if any as to the value of the property after the sale has taken place because the proviso bars the objection only if it is taken for the first time after the sale.

Accordingly we dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and
Mr. Justice Wazir Hasan.*

ERNEST ARTHUR WYLIE (PLAINTIFF-APPELLANT) v.
MRS. RUTH SHANTI WYLIE (DEPENDANT-RESPONDENT).*

1929
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*Indian Divorce Act (IV of 1869), section 19(1)—Impotence—
Venereal disease in a woman, if constitutes "impotence"
within the meaning of section 19(1) of the Divorce Act.*

The existence of venereal disease in a woman does not constitute impotence within the meaning of section 19, subsection (1) of the Indian Divorce Act, 1869. *Birendra Kumar Biswas v. Hemlata Biswas* (1), dissented from.

Messrs. *St. G. Jackson and Satya Nand Roy*, for the appellant.

Mr. Moti Lal Saxena, for the respondent.

STUART, C. J.:—This is an appeal against the decision of Mr. Justice PULLAN in which he refused to grant the petitioner Ernest Wylie either a decree for nullity of marriage or for a divorce against his wife.

*First Civil Appeal No. 25 of 1929, against the decree of the Hon'ble Mr. A. G. P. Pullan, Judge of the Chief Court of Oudh, dated the 15th of February, 1929.