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MULLICK, J.

that they cover irregularities and not illegalities. I agree that it is often said that section 99 extends not to cases where there is complete absence of jurisdiction but only to cases where there is jurisdiction and something has been done in excess of jurisdiction. It is unnecessary for us to examine the authorities dealing with this part of the case because, in my opinion, there was no illegality or irregularity whatsoever in the arrest.

The order, therefore, that we shall make is, that the appeal be allowed and that the case be remanded to the Sessions Judge of Purnea for rehearing. He will decide the questions of fact which arise upon the evidence. We only decide the question whether the arrest was legal.

The District Magistrate, upon receiving this judgment, will call upon the respondents to surrender and will then inform the Sessions Judge of the fact of his having done so in order that he may fix a day for the rehearing of the appeal. As the respondents were on bail in the Court of the Sessions Judge the District Magistrate will be competent to release them on adequate bail to appear before the Sessions Judge for the hearing of the appeal.

BUCKNILL, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, J.J.

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Jan. 16.

MEDNI PRASAD SINGH

v.

NAND KESHWAR PRASAD SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 90—"*whose interests are affected by the sale*"—

*Appeal from Original Decree No. 82 of 1920 from a decision of Babu Satish Chandra Mitra, Subordinate Judge, Second Court of Monghyr, dated the 11th March, 1920.

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decree against some of the members of a joint family—sale of joint family property—suit by another member to set aside sale, maintainability of—plaintiff entitled to decree for possession and defendants entitled to partition.

Where joint family property is sold in execution of a decree obtained against some of the members of the family and for which such members are alone liable, any other member of the family having an interest in the property may sue to set aside the sale, and is not bound to apply under Order XXI, rule 90, of the Code of Civil Procedure, 1908.

In such a case, if the plaintiff succeeds in proving that the family was joint at the time of the sale, he is entitled to a decree for possession and the defendants (the auction-purchasers) are entitled to take proceedings to have the shares and interests of their judgment-debtors ascertained by partition.

Deendayal v. *Jugdeep Narain Singh*(1), followed.

Appeal by the plaintiffs.

The facts of the case material to this report were as follows :—

In 1917 the defendants institnted a suit against the plaintiffs 1 and 2 to recover a sum of money upon a *chitta* and obtained a decree for money as against plaintiffs 1 and 2. They put the decree in execution and put up to sale the right, title and interest of plaintiffs 1 and 2 in certain properties which, in the present suit, were alleged by the plaintiffs to be joint family properties of all the plaintiffs. On the 14th of December, 1918, the defendants purchased a 10-annas, 13-*dams* proprietary interest in the properties which in their view was the share of the plaintiffs 1 and 2 in the properties. Plaintiffs 1 and 2 thereupon applied under the provision of Order XXI, rule 90, Code of Civil Procedure, for setting aside the sale. That application was dismissed for default and the plaintiffs 1 and 2 thereupon applied for restoration of that application under Order IX, rule 9, and that

(1) (1878) I. L. R. 3 Cal. 198; L. R. 4 I. A. 247.

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application was ultimately dismissed. On the 3rd March, 1919, the suit out of which this appeal arose was instituted by the plaintiffs for recovery of possession of the properties which were taken possession of by the defendants in execution of their decree against plaintiffs 1 and 2. Plaintiff No. 4 was the son of plaintiff No. 1 and plaintiff No. 3 was the brother of plaintiffs 1 and 2.

The allegations in the plaint were the necessary allegations which an applicant in an application for setting aside a sale under Order XXI, rule 90, is required to make; but in the 12th paragraph of the plaint, the plaintiffs alleged that plaintiffs 1 and 2 had no specific share in the joint family properties and that no definite share in the joint family properties could in law be purchased by the defendants. The defendants in their written statement contended that the plaintiffs had no cause of action and resisted the plaintiffs' suit on the merits. They also alleged that the plaintiffs were all separate from each other and that all that they had purchased was the right, title and interest of plaintiffs 1 and 2 and that the plaintiff No. 3 could not join them in recovering possession of the share purchased by the defendants.

The Subordinate Judge came to the conclusion that the plaintiffs had no cause of action as against the defendants and, in that view, dismissed the whole suit without discussing the other issues which were framed by him.

P. K. Sen (with him *Susil Madhab Mullick* and *Sivanandan Roy*), for the appellants.

Guru Saran Prasad, for the respondents.

DAS, J., after stating the facts as set out above, proceeded as follows :—

It has been pointed out by the Judicial Committee over and over again that the Courts in India ought to decide all the issues in order to save a remand, and in my opinion the learned Subordinate Judge should

certainly have recorded the evidence in the case and decided all the issues that arose in the case. Had he adopted that course, it would not have been necessary for us to remand the case to him.

On the question whether the plaintiffs have a cause of action as against the defendants, I agree with the learned Subordinate Judge that the plaintiffs 1 and 2 have no cause of action as against the defendants; but I entirely differ from him on the question whether the plaintiff No. 3 has a cause of action as against the defendants. The view of the learned Subordinate Judge is this:

"The plaintiff No. 3 is a person whose interests are affected by the sale. He could have come under Order XXI, rule 90, to have the sale set aside. He did not do so. Rule 92 provides that where no application is made under Rule 90, and where such an application was made and disallowed, the Court is to confirm the sale and no suit would lie to set aside the order confirming the sale, or, in other words, the sale. Thus the case of the plaintiff No. 3 comes under the provision where no application is made."

In my view it was not necessary for the plaintiff No. 3 to apply under the provision of Order XXI, rule 90; he was not a party to the suit and his case is that under cover of a decree obtained by the defendants as against plaintiffs 1 and 2, they have seized and taken possession of property which was the joint family property and in which he has an interest. Clearly he has a right to enforce his claim by a suit and it was not at all necessary for him to apply under the provision of Order XXI, rule 90. That being so, the case must go back to the learned Subordinate Judge in order that he may determine the other issues that arise in this case.

But in order to avoid a failure of justice it is necessary to point out what the plaintiff No. 3 would be entitled to if he succeeds in his contention that the family was joint at the time when the interest of plaintiffs 1 and 2 were attached in execution of the decree obtained by the defendants as against them. It is quite clear that a member of a joint Hindu *Mitakshara* family has an interest which is capable of being attached in execution of a decree as against him.

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In this view the attachment and the sale of the interest which was of plaintiffs 1 and 2 would be good and binding upon the joint family. But though a creditor can attach and purchase the interest of a member of a joint *Mitakshara* Hindu family, it is not open to him to take possession of that interest. The position is clearly indicated in the case of *Deendayal* against *Jugdeep Narain Singh* (1). In that case their Lordships of the Judicial Committee pointed out the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale. They said that just as a partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of all the partners although the purchaser at the execution sale could acquire the interest sold, with the right to have the partnership accounts taken in order to ascertain and realise its value: so also though a member of a joint Hindu family could not himself have sold his share so as to introduce a stranger into the joint family, the purchaser, by purchasing at an execution sale, acquires the right to compel the partition which his debtor might have compelled had he been so minded, before the alienation of his share took place. In other words the purchaser of the share of a member of a joint *Mitakshara* Hindu family acquires the right to compel a partition but not a right to enter into joint possession with the other members of the joint family.

If the learned Subordinate Judge comes to the conclusion that the family was joint at the time when the defendants purported to purchase the right, title and interest of plaintiffs 1 and 2 in the joint family properties, he will give a decree for possession to plaintiff No. 3; but he will make a declaration that the defendants as purchasers at the execution sale have acquired the share and interest of plaintiffs 1 and 2 in the property and that they are entitled to take such proceedings as they shall be advised to have that share

(1) (1878) I. L. R. 3 Cal. 198; L. R. 4 I. A. 247.

and interest ascertained by partition. We are unable ourselves to pass a decree to that effect because there is a contention of the defendants that the family was separate. This is an issue which it is necessary for the learned Subordinate Judge to try.

We allow the appeal of plaintiff No. 3, set aside the judgment and decree passed by the learned Subordinate Judge and remand the case to the learned Subordinate Judge for disposal according to law in accordance with the observations made in this judgment.

The decision of the learned Subordinate Judge with regard to the plaintiffs 1, 2 and 4 will, however, stand. I think that in the circumstances the defendants are entitled to their costs of this appeal. The costs incurred in the Court below will abide the result and will be disposed of by the lower Court.

KULWANT SAHAY, J.—I agree.

Case remanded.

APPELLATE CIVIL.

Before Mullick and Ross, J.J.

MAULAVI MUHAMMAD FAHIMUL HUQ

v.

JAGAT BALLAV GHOSH.*

1922.

Nov., 25.

Waqf—*alienation by* mutwalli—*suit by beneficiary to set aside alienation, parties to—Code of Civil Procedure,* 1908 (*Act V of* 1908), *Order* 1, *rule* 8—*consequential relief, when prayer for, is necessary—Specific Relief Act,* 1877 (1 *of* 1877), *section* 42—*Limitation*—terminus a quo—*Limitation Act,* 1908 (*Act IX of* 1908), *Schedule* 1, *article* 120.

A beneficiary of a trust in respect of a Muhammadan *waqf* interested in the maintenance of a mosque or other

* *Circuit Court, Cuttack.* Appeal from Original Decree No. 3 of 1921, from a decision of Lalla Tarak Nath, Sub-Judge of Cuttack, dated the 28th September, 1920.