In the present case the objection of the judgment-debtor was that the house on the smaller plot had not been sold and that it was not competent for the Court to sell it. In my opinion the objection was one under section 47, and the order of the Court in favour of the decree-holder was, in my judgment, appealable.

1925.

ASKARAN BAID v. RAGHUNATH PRASAD.

MULLICK, J.

The appeal therefore lies, but as it fails on the merits it is dismissed with costs.

Ross, J.—I agree that the appeal should be dismissed.

Appeal dismissed.

SPECIAL BENCH.

Before Mullick, Ross and Kulwant Sahay, J.J.

MOHIT NARAIN JHA

v.

THAKAN JHA.*

1925.

April, 16.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXI, rule* 66—*Order refusing to notify a lease in the sale proclamation, whether final*—res judicata—*appeal.*

An order of the Court determining any of the particulars to be stated in the sale proclamation under Order XXI, rule 66, is not a final order and cannot operate as *res judicata*, the parties being at liberty to re-open the same question in a subsequent proceeding.

An order refusing to notify a lease in the sale proclamation is an order under Order XXI, rule 66, and is not appealable.

Appeal by the judgment-debtor.

This was an appeal by one of the judgment-debtors, Mohit Narain Jha, against an order of the Subordinate Judge of Darbhanga, dated the 5th of April, 1924, rejecting his application of objection to

* Appeal from Original Order no. 82 of 1924, from an order of B. Sheonandan Prasad, Subordinate Judge of Darbhanga, dated the 5th April, 1924.

1925.

MOHIT NARAIN JHA v. THAKAN JHA.

the execution proceedings. The decree under execution was passed on the basis of a mortgage bond executed by one Shibnath Jha on the 27th of September, 1916, in favour of Mussammat Debdhira Dai, mortgaging certain properties. Three of those properties were held in lease by the present appellant under a *thika patta*, dated the 7th of January, 1915, executed by Shibnath Jha for a term of seven years from 1322 to 1328 *Fs.* The *patta* provided that, after the expiry of the lease in 1328, the lessee was to continue in possession for another term of seven years from 1329 to 1335 on the same *jama* and conditions as the original lease; and that the lessor was to execute a fresh *patta* for the subsequent period. It appeared that the mortgagee, Debdhira Dai, objected to advance the loan and to take the mortgage unless the lessee agreed to give up possession of the leasehold properties after 1328, in case she had to purchase any of those properties either by a private conveyance or in execution of a mortgage decree for the satisfaction of the mortgage debt. The lessor induced the lessee to agree to this term and, accordingly, on the same day on which the mortgage was executed, namely, the 27th September, 1916, the lessee executed an *ekrarnama* in favour of the mortgagee, Mussammat Debdhira Dai, in which he agreed to waive his *thika* right and to relinquish possession of the property which the mortgagee might purchase either by private sale or at a sale in execution for payment of the mortgage debt. The mortgagee instituted a suit to enforce the mortgage and, in this suit, the lessee, who is the present appellant, was made a party and was the defendant no. 8.

One of the issues raised in the mortgage suit was issue no. 2 which ran thus:

"Is the *ekrarnama*, dated the 27th of September, 1916, binding on defendant no. 8 and has plaintiff any cause of action against him?"

The Subordinate Judge held that according to the terms of the *ekrarnama* of 1916, the defendant no. 8's

lease would be subject to the plaintiff's mortgage if the dues of the plaintiff were not paid by the executant till 1328. He further held that the defendant was bound to give up possession of the property if the plaintiff purchased any of the mortgaged properties; and the usual mortgage decree was made in which it was directed that the defendant no. 8 would be bound to give up possession after 1328 if the plaintiff herself purchased any of the properties. Debdhira Dai executed this decree in execution case no. 166 of 1922. An application was filed by the present appellant praying that a note be made in the sale proclamation that the mortgaged property should be sold subject to his lease, and that after the decree-holder purchased the properties, the applicant should give up possession thereof after 1328.

The Subordinate Judge refused this application by his order, dated the 26th of August, 1922. The reason given for refusing the application was that the lease had expired in 1328, and that therefore the lessee had no right to continue in possession, the application for making the note in the sale proclamation having been filed in the year 1329, that is, after the expiry of the lease. This execution case was, however, ultimately dismissed.

The original decree-holder thereafter assigned her decree to the present respondent Thakan Jha. The present execution (Execution Case no. 283 of 1923) was taken out by the assignee and the appellant filed an objection to the execution in which he objected to the competence of the assignee to take out execution on the ground that he was merely a *farzidar* for Kamalnath Jha, judgment-debtor. He also prayed that, in case the assignee was held entitled to proceed with the execution, a note might be made in the sale proclamation that the properties advertised for sale should be sold subject to his prior lease which extended up to 1335. The Subordinate Judge rejected the objection of the appellant on a finding that the assignee was not the *farzidar* for Kamalnath Jha

1925.

MOHIT NARAIN JHA v. THAKAN JHA.

and that the application for making a note in the sale proclamation was barred by *res judicata* on account of the previous order of the Subordinate Judge in the execution case of Debdhira Dai, dated the 26th of August, 1922, mentioned above. He further held that on a true interpretation of the *ekrarnama* in favour of the original decree-holder, the assignee was entitled to take the benefit thereof, and that the agreement contained in the *ekrarnama* was not a personal agreement with Debdhira Dai as was contended by the appellant. Against this order the appellant appealed to the High Court.

K. P. Jayaswal (with him *Lachmi Kant Jha*), for the appellant: I am entitled to raise a plea which was not and could not be raised in the previous execution case. The principle of constructive *res judicata* does not extend to execution proceedings. In the previous case the order of the Court was based only on one of the reasons urged here. The question of lease was, if at all, incidentally gone into for the purpose of determining the real point which was directly and substantially in issue. A wrong decision, however, cannot operate as *res judicata*.

Murari Prasad (with him *Anrudhji Burman*), for the respondent: This identical objection was taken in the previous execution proceeding but was disallowed. The prayer of the judgment-debtor could not have been disposed of without the Court first deciding the point whether or not there was a subsisting lease. The question was one between the decree-holder and the judgment-debtor under section 47, Civil Procedure Code, so the decision is a decree.

[KULWANT SAHAY, J.—It is settled law that the question of valuation decided by the executing Court under Order XXI, rule 66, will not be binding on the parties in a subsequent proceeding; similarly an order drawing up the sale proclamation might not be binding on the parties concerned.]

The Court in fact took up the point and rightly or wrongly decided it as a direct and substantial issue

1925.

Mohit Narain Jha v. Thakan Jha.

in the case. The decision, therefore, operates by way of *res judicata* and cannot be reagitated in the present proceeding. Even if the judgment of the executing Court is not in accordance with law, it is final and binding on the parties [*Ramlal Mulikand* v. *Deodhari Rai*(1)].

Jayaswal, in reply.

Kulwant Sahay, J. (after stating the facts set out above, proceeded as follows): The first point taken by the learned Counsel for the appellant is that the assignee was a *farzidar* for Kamalnath Jha, one of the judgment-debtors, and, therefore, he was not entitled to execute the decree. The learned Subordinate Judge has discussed the evidence and has come to the conclusion that it has not been satisfactorily established that the assignee was a *farzidar* for Kamalnath Jha. On a consideration of the evidence which has been placed before us, I am of opinion that the learned Subordinate Judge was right in his conclusion on this point.

The learned Counsel has referred to the evidence on behalf of the assignee, and has argued that this evidence is not sufficient to show that he was a real purchaser, but it was for the appellant to prove conclusively that the assignee was a *farzidar* for the judgment-debtor. The evidence on his behalf is not at all satisfactory to prove the *farzi* character of the assignment; and this ground of the appellant must fail.

The second ground taken by the learned Counsel for the appellant is that the Subordinate Judge was wrong in holding that the present application in so far as it asked a note to be made in the sale proclamation about the properties being subject to the appellant's lease was barred by *res judicata.* This contention appears to be sound The application made by the present appellant in the previous execution case was

(1) (1923) I. L. R. 2 Pat. 771.

1925.

MOHIT NARAIN JHA v. THAKAN JHA.

KULWANT SAHAY, J.

that his lease might be notified in the sale proclamation. Now this was an application in connection with the drawing up of the sale proclamation as provided by Order XXI, rule 66, of the Civil Procedure Code. The Court executing the decree is required to state certain particulars in the sale proclamation and in order to state those particulars it is sometimes necessary that the Court should hold a summary enquiry. The sale proclamation has to be drawn up under Order XXI, rule 66, of the Code after notice to the decree-holder and the judgment-debtor, and both parties are entitled to apply to the Court asking it to state such particulars in the sale proclamation as they think proper. When there is a difference between the decree-holder and the judgment-debtor as regards any of the particulars to be stated in the sale proclamation, the Court has to make a summary enquiry and pass orders after such enquiry. One of the particulars to be stated in the sale proclamation is as regards the encumbrance to which the property sought to be sold is liable. Another particular to be stated therein, as provided by clause (*e*), sub-rule (*2*), rule 66, is everything which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. Under this head the matter, which is usually enquired into by the Court, is as regards the valuation of the property and evidence is generally given under clause (*4*) of the rule in order to enable the Court to state those particulars. It has been held that the order of the Court determining any of the particulars to be stated in the sale proclamation under Order XXI, rule 66, is not a final order and the parties are at liberty to reopen the same question in a subsequent proceeding such as a proceeding relating to setting aside the sale under Order XXI, rule 90, of the Code of Civil Procedure. The order of the Court in the previous execution case of the original decree-holder, dated the 26th of August, 1922, was therefore not a final order but an interlocutory order after a summary enquiry; and it cannot be held that such an order would operate as *res judicata* in a subsequent

proceeding. Moreover the objection taken on the previous occasion was that the lease had expired in 1328*Fs*. and was not subsistent at the time the previous execution was taken out. The objection in the present case is that the present decree-holder, who is the assignee of the original decree-holder, is not entitled to the benefit of the *ekrarnama* which was a personal agreement with the original mortgagee-decree-holder. No doubt there was a summary decision in the previous execution case that the lease had expired in 1328, but that was only a reason given for disallowing the prayer of the judgment-debtor to notify the lease in the sale proclamation. It is the final order which operates as a bar in cases where the principle of *res judicata* is applicable. The reasons given for the final order cannot operate as a bar. In a subsequent proceeding between the heirs of the original lessor and the lessee it has been determined by this Court that the lease did not expire in 1328, but would expire in 1335. No doubt the present decree-holder or his predecessor was not a party to the proceeding in which that decision was come to, but I am of opinion that it is still open to the lessee, the present appellant, to raise that question in the presence of the present decree-holder. I am therefore of opinion that the learned Subordinate Judge was wrong in holding that the present application of the appellant was barred by *res judicata*.

It has, however, been contended by the learned Vakil for the respondent that if the order in the previous execution case be held merely to be an order under Order XXI, rule 66, of the Code and not an order under section 47, then the present order under appeal, so far as it dissallows the appellant's prayer to notify the lease in the sale proclamation, is also an order under Order XXI, rule 66, of the Code and is therefore not appealable. This objection of the respondent appears to be sound. The order of the learned Subordinate Judge, in so far as it refuses to notify the lease in the sale proclamation, is really an order under Order XXI, rule 66, and is therefore not

1925.

MOHIT NARAIN JHA v. THAKAN JHA.

KULWANT SAHAY, J.

appealable; and the present appeal, in so far as this part of the order is concerned, is incompetent.

The question, however, as regards the interpretation of the *ekrarnama* was raised in the Court below and decided by it. It has also been raised before us and has been fully argued on both sides. I think it therefore desirable to express my opinion as regards the interpretation thereof. It has been contended on behalf of the appellant that the agreement contained in the *ekrarnama* was an agreement entered into with the mortgagee Mussammat Debdhira Dai personally, and her heirs or representatives are not entitled to take the benefit thereof. Reference is made to the terms of the *ekrarnama* and to the absence of any expression showing that it was the intention of the parties that the heirs or representatives of the original mortgagee could enforce the terms of the *ekrarnama.* I have read the *ekrarnama* carefully and I have considered the circumstances under which it was executed; and I am of opinion that the intention of the parties was that not only the mortgagee Mussammat Debdhira Dai personally was to take advantage of the terms thereof, but that her heirs and assignees and legal representatives were also entitled to the benefit thereof. It is to be noted that the terms of this *ekrarnama* were settled before the mortgage was executed although the actual execution of the *ekrarnama* took place after the execution of the mortgage bond. There is a recital in the *ekrarnama* that the lessor Babu Shibnath Jha was in need of money but the money-lender raised the objection that in the event of non-payment of the debt up till 1328 if she (the *mahajan*) be under the necessity of getting a *kabala* executed in respect of the mortgaged property or of purchasing at an auction-sale any of the *mauzas* held in lease by the lessee she would be put to loss if the lessee continued to hold possession after 1328. The *ekrarnama* was therefore executed at the request of Babu Shibnath Jha for the satisfaction of the *mahajan*, the money-lender. It was a part of the terms of the mortgage and to my mind it seems clear that the mortgage was executed

with the stipulation that in case the mortgagee purchased the property the lessee would give up possession after 1328. I see no reason to hold that this was a personal agreement to enure for the benefit of Mussammat Debdhira Dai personally and not of her heirs and representatives. It had the effect of enlarging the security and must be taken to be for the benefit of the mortgagee and her heirs and representatives.

Stress is laid by the learned Counsel for the appellant on the expression contained in the *ekrarnama* to the effect that if the said *mahajan herself* purchased any of the leasehold properties then the lessee would give up possession after 1328; and it is contended that the expression " herself " shows that it was intended that Mussammat Debdhira Dai alone could take advantage of this *ekrarnama*. In my opinion this contention is not sound. What was intended to be expressed was that if the mortgagee purchased then the lessee would give up possession; if an outsider or a third person purchased, then the lessee would not give up possession. What was contemplated was the case of the mortgagee becoming the auction-purchaser in contradistinction to a third person purchasing the property.

It is next argued that there was no intention that this covenant should run with the land; and it is pointed out that it was stipulated in the *ekrarnama* that if the mortgagee purchased one, two or all the three *mauzas* and obtained delivery of possession thereof, the condition as regards relinquishment by the lessee shall hold good in respect of the one, two or three *mauzas* which the mortgagee might purchase and not of the other *mauza* or *mauzas* which she might not purchase. I am unable to see any force in this contention. This term in the *ekrarnama* is in no way in conflict with the previous terms thereof and does not show that the covenant was not to run with the land. It only emphasizes the fact that no one except the mortgagee was to get the benefit of the agreement; and

1925.

MOHIT NARAIN JHA v. THAKAN JHA.

KULWANT SAHAY, J.

that if the mortgagee purchased only one or two out of the three leasehold properties, then she would be entitled to take possession of only that one or those two properties. Reference has been made by the learned Counsel for the appellant to section 6, clause (*d*), of the Transfer of Property Act which provides that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him; and it is argued that the assignment, in so far as the terms of the *ekrarnama* are concerned, is bad in law. This would be so only if it be held that the covenant in the *ekrarnama* was a personal agreement with Mussammat Debdhira Dai. Once it is found that it was not a personal covenant, section 6, clause (*d*), of the Transfer of Property Act can have no application to the present case.

I am therefore of opinion that the learned Subordinate Judge was right in holding that the covenant in the *ekrarnama* was for the benefit of the decree-holder, whoever he might be, at the time of the execution of the decree. I would, however, dismiss this appeal in so far as the question of the *farzi* character of the assignment is concerned against the appellant on the merits, and in so far as the appellant's application to notify the lease in the sale proclamation is concerned, on the ground that no appeal lies against this portion of the order. The appellant ought to pay the costs of this appeal.

MULLICK, J.—I agree.

ROSS, J.—I agree that the appeal so far as it questions the right of the respondent to execute the decree on the ground that he is a *farzidar* of one of the judgment-debtors should be dismissed; and I also agree that no appeal lies against the decision of the Subordinate Judge refusing to notify the appellant's lease in the sale proclamation. The appeal should therefore be dismissed with costs.

S. A. K.

Appeal dismissed.