

## APPELLATE CIVIL.

Before *Mullick and Ross, J.J.*

ASKARAN BAID

v.

RAGHUNATH PRASAD.\*

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 98—Order relating to resistance against possession, whether appealable—section 47.*

An order under Order XXI, rule 98, delivering or refusing to deliver property decree-holder auction-purchaser relates to the execution of the decree and is therefore appealable under section 47, Civil Procedure Code.

*Hari Charan Dutta v. Manmohan Nandi* (1), followed.

*Bhagwati v. Bunwari Lall* (2), not followed.

The generality of the term "parties to the suit" in section 47 should not be limited and made to apply only to questions arising before the auction-purchase; a decree-holder does not cease to be a party merely because the Court makes the contract of sale for him.

*Sasi Bhusan Mookerjee v. Radha Nath Bose* (3), referred to.

Appeal by the judgment-debtor.

The facts of the case material to this report are stated in the judgment of Mullick, J.

*K. Hussain and Kailas Pati*, for the appellant.

*Murari Prasad and Brij Kishore Prasad*, for the respondent.

MULLICK, J.—This appeal arises out of an application made under Order XXI, rule 97, of the Civil

\* Appeal from Original Order no. 141 of 1924, from an order of B. Raj Narayan, Subordinate Judge of Gaya, dated the 30th April, 1924.

(1) (1918-14) 18 Cal. W. N. 27. (2) (1909) I. L. R. 31 All. 82,

(3) (1914-15) 19 Cal. W. N. 805.

Procedure Code against a judgment-debtor in a mortgage decree who is alleged to have resisted the delivery of possession to the decree-holder. The decree has not been printed, but the Subordinate Judge states that the property is described as

"one *kita makan* with the land, *haksakunati* and *choukath* and *hewar* and other *lawazimat* appertaining to the house."

He also states that the house is described as

"within the Gaya municipality, bearing no. 49 in Ward no. 10."

He further states that the decree gives no boundaries nor any area. In the execution petition which was filed on the 20th February 1923, the area is given as 2 *kathas* and the description is as above. In the first sale proclamation, which was published shortly afterwards, the description is substantially the same; but the area is given as 2 *kathas*, 2 *dhurs*. In the second sale proclamation the area is further altered to 2 *kathas*, 7 *dhurs*, and the sale certificate which has been printed shows that what was sold was:

"one two-storeyed *pakka* house together with the land and the residential right as also the door frames and door leaves and other materials of the house, holding no. 49, Ward no. 10, paying the annual holding and latrine tax of Rs. 22-8-0."

The sale certificate states the approximate area as 2 *kathas*, 7 *dhurs*.

When the Civil Court peon went to give delivery of possession of this property on the 1st March, 1924, he was resisted by the judgment-debtor Raghunath Prasad and others.

It is now found that at the time of mortgage there was a piece of waste land near the house and that another house has been built upon it since then and that the area of the sites upon which the two houses stand are respectively 2 *kathas*, 7 *dhurs*, and 2 *kathas*. In the summary inquiry, which he has held under Order XXI, rule 97, the Subordinate Judge finds that what was mortgaged and sold was the house standing on the 2 *kathas*, 7 *dhurs*, inclusive of the land and that it was never intended to mortgage or to sell the other plot of 2 *kathas*.

1925.

ASKARAN  
BAID  
v.  
RAGHUNATH  
PRASAD.

MULLICK, J.

1925.

ASKARAN  
BAIDv.  
RAGHUNATH  
PRASAD.

MULLICK, J.

The decree-holder, however, claims this plot as a part of the property covered by the mortgage and also the house standing on it as an increment thereto.

Having regard to the descriptions given (1) in the execution petition, (2) in the two sale proclamations, and (3) in the sale certificate, it is difficult to see how the decree-holder can be entitled to delivery of possession of the plot of 2 *kathas* and the house standing thereon. He contends that the ruling description of the property is the holding number and that the area is only a false demonstration. I agree with the Subordinate Judge that this cannot be so. The decree-holder deliberately chose to sell one house standing on a site of 2 *kathas* or 2 *kathas*, 7 *dhurs*. At the time of the mortgage suit the second house had already been built, but he took no trouble to mention that fact in his plaint and he was careful not to give either the area or the boundaries of the mortgaged land. He gave instead the municipal number which is not a permanent description and may change at any moment. Having regard to the facts of this case, I do not think it can be accepted as the description which identifies the property. In my opinion what was mortgaged was only the house which existed at the time of the mortgage and the site upon which it stood. On the merits therefore the learned Subordinate Judge was right.

It is also contended by the respondent that no appeal lies.

It is urged that an order delivering or refusing to deliver possession to a decree-holder is not an order relating to the execution, satisfaction or discharge of the decree and therefore is not appealable as an order made under section 47 of the Civil Procedure Code.

Now in one sense it is true that a decree for the enforcement of a mortgage by the sale of the mortgaged property is satisfied as soon as the sale takes place and the decretal amount is deposited to the credit of the decree-holder. But at the same time the legislature has thought fit to make rules for regulating the

1925.

ASKARAN  
BAID  
v.  
RAGHUNATH  
PRASAD.  
MULLICK, J.

procedure for annulling or giving effect to the sale. These rules are included in Order 21 which deals exclusively with execution and I do not think it will be a straining of language to hold that proceedings connected with the delivery of possession referred to in rule 94 and the subsequent rules are proceedings relating to the execution of the decree. From this point of view an order under rule 98 would, in my opinion, be one relating to execution. Whether an order relating to resistance against delivery of possession is appealable will depend on whether sections 2 and 47 apply to it, and I have no doubt that when the decree-holder is the auction-purchaser and is resisted by the judgment-debtor an order made under rule 98 is appealable as a decree.

Indeed in a mortgage suit it is difficult to conceive anything more vital to the satisfaction of the decree than the delivery of possession to the decree-holder of the property which he has purchased at the auction sale in part or full payment of his decree. The machinery of the Court sale merely substitutes a contract by the Court for one by the parties themselves. If the contract had been made by the parties, the delivery of possession would have been the most important ingredient of the contract for setting off the purchase money against the decretal sum and I see no reason why it should be otherwise at a Court sale.

I agree therefore with the dissenting judgment of Stanley, C.J., in *Bhagwati v. Banwari Lal* (1), and with the judgment of the Calcutta High Court in *Hari Charan Dutta v. Manmohan Nandi* (2). There are observations in *Sasibhushan Mukharji v. Radhanath Bose* (3), to the effect that the decree-holder purchaser has no higher rights than any other auction-purchaser; but the decision of that case did not turn upon those observations. It is difficult to see why the generality of the term "parties to the suit" in section 47 should

(1) (1909) I. T. R. 31 All. 82.

(2) (1913-14) 18 Cal. W. N. 27.

(3) (1914-15) 19 Cal. W. N. 885.

1925.

ASKARAN  
BAID

v.

RAGHUNATH  
PRASAD.

MULLICK, J.

be limited and apply only to questions arising before the auction-purchase and why a decree-holder should cease to be a party merely because the Court makes the contract of sale for him.

A reference to rule 102 would to some extent seem to support this view. Under this rule the decree-holder has, but the judgment-debtor has not the right to challenge a decision under rule 98 by suit and if section 47 does not apply, then the decree-holder has an unfair advantage. If, however, section 47 is held to be applicable, this inequality is removed and rule 103 is left to operate between the decree-holder purchaser on the one hand and a third party acting under the instigation of the judgment-debtor on the other. It has to be admitted, however, that the rule still leaves an inequality in so far as it penalises a judgment-debtor who may have made an arrangement with a third party auction-purchaser that he will not take immediate possession [such as was disclosed in *Hari Charan Dutt's* case (1)], but with such a case we are not at present concerned.

But in the majority of cases the judgment-debtor resists on the ground that the property of which delivery of possession is sought, was not in fact sold or that if it was sold, the sale was illegal or contrary to the terms of the decree. In such an objection the auction-purchaser, whether he be the decree-holder or a third party, would be a necessary party and the order of the Court disposing of the objection would certainly be a decree under section 47; but the objection must be made before delivery of possession. In *Durga Charan Mandal v. Kali Prasanna Sarkar* (2), an objection was taken after the confirmation of the sale but before delivery of possession that the holding was not saleable and it was held that the execution Court was competent to investigate it under section 47 provided the judgment-debtor could show that he was ignorant of the processes that led to the sale.

(1) (1918-14) 18 Cal. W. N. 27. (2) (1899) I. L. R. 26 Cal. 727.

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.

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.\*

1924.

ASKARAN  
BAIE  
v.  
RAGHUNATH  
PRASAD.

MULLICK, J.

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.