

It is argued by the learned Counsel for the respondents that this Court should not interfere with the discretion exercised by the lower Court, and it is pointed out that the lower Court did give reasons for awarding costs in favour of the plaintiff. But it is clear to me that the reasons he gives are not good reasons and that he acted on a wrong principle. In every partition case, before a suit can be instituted, there must be a demand and a final refusal. In the present case there was a demand and refusal, but the defendants took no further steps to contest the plaintiff's case.

So much of the decree of the lower Court as deals with the question of costs must be modified and the parties will bear their own costs up to the preliminary decree in the suit.

The appeals are allowed to this extent. Each party will bear its own costs in this Court.

KULWANT SAHAY, J.—I agree.

Decree modified.

APPELLATE CIVIL.

Before Macpherson and Fazl Ali, JJ.

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v.

RAMCHARAN HANUMAN SONAR.*

Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rules 95 and 97—proceeding between judgment-debtor and stranger auction-purchaser, whether a proceeding between parties to the suit—order in the proceeding, whether appealable as decree—section 47—Order XXI, rules 95 and 97, application under, whether a proceeding relating to the execution, discharge or satisfaction of the decree.

*Appeal from Appellate Order no. 156 of 1929 and Civil Revision no. 263 of 1929, from an order of Babu Sadhu Charan Mahanti, Subordinate Judge of Chaibasa, dated the 26th April, 1929, reversing an order of Babu Nideshwar Chandra Chandra, Munsif of Jamshedpur, dated the 22nd September, 1928.

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An application under Order XXI, rule 95 or 97, Code of Civil Procedure, 1908, is not a proceeding relating to the execution, discharge or satisfaction of the decree.

Bhagwati v. Banwari Lal (1), *Triloke Nath Jha v. Bansman Jha* (2), *Jadab Chandra Poddar v. Rameshwar Marwari* (3) and *Haji Abdul Gani v. Raja Ram* (4), followed.

Askaran Baid v. Raghunath Prasad (5), not followed.

Kailash Chandra Tarafdar v. Gopal Chandra Poddar (6), referred to.

A proceeding under Order XXI, rule 97, between the judgment-debtor on the one hand, and a stranger auction-purchaser on the other, is not a matter arising between the parties to the suit, so as to fall within section 47, and therefore, an order passed in that proceeding is not appealable as a decree.

Sasi Bhusan Mookerji v. Radha Nath Bose (7) and *Kailash Chandra Tarafdar v. Gopal Chandra Poddar* (6), followed.

Appeal by the auction-purchaser.

The circumstances which give rise to this appeal were briefly these.

The opposite party no. 2 obtained a decree against opposite party no. 1 in Money Suit no. 30/182 of 1925. In execution of the decree certain properties were sold and purchased by the appellant and on the 12th June, 1928, a sale certificate was granted to him. When the appellant, however, went to take delivery of possession he was resisted by the judgment-debtor and thereupon he filed an application under Order XXI, rule 97, Code of Civil Procedure. The main point which arose in connection with that application was whether the sale certificate related to an area of 4 kathas or 7 kathas of land.

(1) (1908) I. L. R. 31 All. 82, F. B.

(2) (1922) I. L. R. 2 Pat. 249.

(3) Ante, p. 332.

(4) (1916) 1 Pat. L. J. 282, F. B.

(5) (1925) I. L. R. 4 Pat. 726.

(6) (1926) 30 Cal. W. N. 649, F. B.

(7) (1914) 19 Cal. W. N. 885.

The Munsif decided in favour of the appellant holding that the sale was in respect of 7 kathas of land. From this decision the judgment-debtor appealed to the District Judge and the appeal was heard by the Subordinate Judge who held that the Munsif had not rightly construed the sale certificate. When the appeal was taken up by the Subordinate Judge, one of the points raised on behalf of the appellants before him was that in law no appeal was maintainable by the judgment-debtor from the decision of the Munsif. The Subordinate Judge, however, relying upon certain observations made by Mullick, J. in the case of *Askaran Baid v. Raghunath Prasad* (1) ruled out this objection and held that an appeal did lie.

The appellant thereupon appealed to the High Court and one of the questions which was debated before the Court was whether an appeal before the Subordinate Judge was maintainable.

R. S. Chatterji, for the appellant.

B. B. Mukherji, for the respondent.

FAZL ALI, J.—(after stating the facts set out above proceeded as follows): Now, the answer to this question depends upon whether the proceeding which purported to be under Order XXI, rule 97, can be treated as a proceeding under section 47 of the Code of Civil Procedure. It is clear that if it was a proceeding under section 47, then both an appeal and a second appeal would lie. If, on the other hand, it was not a proceeding under section 47, then no appeal would lie from the decision of the Munsif because the Code of Civil Procedure does not provide an appeal from an order passed under Order XXI, rule 97. In order to determine whether the proceeding before the Munsif was a proceeding under section 47, it must be shown (1) that the proceeding was instituted to determine a question relating to the

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execution, discharge or satisfaction of the decree, and (2) that it was a question to be determined between the parties to the suit in which the decree was passed.

As regards the first point, there has been a considerable difference of opinion in the various Courts in this country. One of the decisions in which the matter has been very exhaustively dealt with is the Full Bench decision of the Allahabad High Court in *Bhagwati v. Banwari Lal* (1). The view taken by the majority of the Court in that case was that any question arising after the sale had been completed and the decree had been satisfied was not a question relating to the execution, discharge or satisfaction of the decree and this view was set forth in the judgment of Banerji, J. in these terms:—

“ Upon the judgment-debtor's property being sold and the amount due under the decree being realised the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined. Whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purposes of the decree and does not in any way affect it. If the decree-holder purchases the property but does not obtain possession, that circumstance would not entitle him to take out execution of the decree, which has already been satisfied. So long as the sale subsists he cannot claim a refund of the purchase-money or ask for execution of the decree to the extent of the amount of the purchase-money.”

The same question was raised in this Court in the case of *Haji Abdul Gani v. Raja Ram* (2) where three Judges of this Court unanimously decided that no appeal lies from an order under rule 95 of Order XXI of the Code of Civil Procedure; and it may be pointed out that Chamier, C.J., who delivered the

(1) (1908) I. L. R. 31 All. 82, F. B.

(2) (1916) 1 Pat. L. J. 232, F. B.

judgment in that case, relied mainly on the Full Bench decision of the Allahabad High Court to which I have just now referred.

The learned Subordinate Judge, however, has referred to another decision of this Court in *Askaran Baid v. Raghunath Prasad* (1) where Mullick, J., without referring to the Full Bench decision, took the view that an order under Order XXI, rule 98, delivering or refusing to deliver property to the decree-holder auction-purchaser related to the execution of the decree and was, therefore, appealable under section 47 of the Code of Civil Procedure. The learned Judge in the course of his judgment went further and made the following observations:

“ 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.”

Now, it may be further pointed out in this connection that this decision was virtually a decision by a single Judge of this Court, because Ross, J., who was a member of the Bench before whom the case came up for hearing, merely agreed that the appeal should be dismissed and evidently did not fully subscribe to all the observations made in the course of the judgment.

It may be pointed out that there are other cases of this Court in which the decision in *Haji Abdul Gani v. Raja Ram* (2) was followed. I may mention only two of those cases at present. One of them is the case of *Jadab Chandra Poddar v. Rameshwar*

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Marwari (1) in which Wort, J., after referring to several cases of this Court as well as other High Courts including the case of *Hargovind Fulchand v. Bhudur Raoji* (2), adhered to the view which was put forward in the earlier case. The other case is *Triloke Nath Jha v. Bansman Jha* (3) in which, in dealing with the question whether an application for delivery of possession was a step in aid of execution, Das, J. referred with approval to the principle laid down in the Full Bench decision in *Bhagwati v. Banwari Lal* (4) and observed as follows:

“ It seems to me that execution comes to an end with the sale of the property and that whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. Mr. Justice Banerji pointed out in the case of *Bhagwati v. Banwari Lal* (4) that if the decree-holder purchases the property but does not obtain possession that circumstance would not entitle him to take out execution of the decree which has already been satisfied. * * * * * The argument is founded on principle and is covered by the decision of this Court in *Haji Abdul Gani v. Raja Ram* (5) which is binding on us.”

It may, therefore, be safely laid down that so far as this Court is concerned the view has prevailed that an application under Order XXI, rule 95 or 97, will not be a proceeding relating to the execution, discharge or satisfaction of the decree. I am, however, not oblivious of the fact that the contrary view has been held in a number of decisions given by some of the other High Courts, prominent among which is the recent decision of a Full Bench of the Calcutta High Court in *Kailash Chandra Tarafdar v. Gopal*

(1) Ante, p. 332.

(2) (1924) I. L. R. 48 Bom. 550.

(3) (1922) I. L. R. 2 Pat. 249.

(4) (1908) I. L. R. 31 All. 82, F. B.

(5) (1916) 1 Pat. L. J. 232, F. B.

Chandra Poddur (1). In my opinion it is unnecessary to discuss the principle laid down in these cases, because the contention that the proceeding before the Munsif was a proceeding under section 47 must fail on the second ground, namely, that the proceeding in question was not between the parties to the suit in which the decree was passed. This leads me to a consideration of the question whether an auction-purchaser who is other than the decree-holder is a representative in interest of one of the parties to the suit. It is now well settled that such an auction-purchaser cannot be considered to be a representative in interest of the decree-holder. In some cases, however, it has been held that he may, for certain purposes, be considered to be a representative of the judgment-debtor. It is urged on behalf of the appellant in this particular case that he cannot be considered to be a representative of the judgment-debtor because the judgment-debtor was still in possession of the property. Assuming, however, that he may be considered to be a representative in interest of the judgment-debtor, it follows that the question which arose before the Munsif was a question between the judgment-debtor on one side and a stranger to the suit, who may be considered to be a representative of the judgment-debtor, on the other side. It is thus clear that in any view it was not a question between the parties to the suit. This aspect of the case has been clearly pointed out in the Full Bench decision of the Allahabad High Court in *Bhagwati v. Banwari Lal* (2) by Banerji, J. in the following passage :—

“ It was held by a Full Bench of this Court in *Gulzari Lal v. Mudho Ram* (3) that an auction-purchaser of the interests of the judgment-debtor, who is bound by the decree, is his legal representative within the meaning of section 244. Therefore, when

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(1) (1926) 30 Cal. W. N. 649, F. B.

(2) (1908) I. L. R. 31 All. 82, F. B.

(3) (1904) I. L. R. 26 All. 447.

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a question arises between the judgment-debtor and the auction-purchaser of his interests it is a question between the judgment-debtor and his representative and is consequently not a question which may be determined under that section."

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Besides, as has been pointed out in *Sasi Bhusan Mookerjee v. Radha Nath Bose* (1) by Mookerjee, J., "it is well settled that when the purchaser is not the decree-holder, a question which may arise in the proceedings for delivery of possession between him and the judgment-debtor does not fall within the scope of section 47". The same view will also appear to be supported on a close reading of the decision in *Kailash Chandra Tarafdar v. Gopal Chandra Poddar* (2). This being so, it is clear that the proceeding before the learned Munsif was not a proceeding under section 47 of the Code of Civil Procedure and, therefore, no appeal lay to the Subordinate Judge. The decision of the Subordinate Judge was thus clearly without jurisdiction and must be vacated.

The appeal is, therefore, allowed with costs.

It is unnecessary to deal with the revision in view of the fact that the appeal succeeds.

MACPHERSON, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Kulwant Sahay and Wort, JJ.

MUSAMMAT BHAGIRATHI KUER

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*Execution—Limitation Act, 1908 (Act IX of 1908).
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*Appeal from Appellate Order no. 153 of 1929, from an order of Phanindra Lal Sen, Esq., District Judge of Gaya, dated the 21st March, 1929, reversing an order of Maulvi Shaikh Ali Karim, Subordinate Judge of Gaya, dated the 17th September, 1928.

(1) (1914) 19 Cal. W. N. 835.

(2) (1926) 30 Cal. W. N. 649, F. B.