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RAI BRINDABAN PRASAD RAI v. BANKU BIHARI MITRA.

MACPHERSON, J.

under section 40 of the Bengal Tenancy Act. The scope of the practice will, it may be hoped, become attenuated under the amendment reducing the limitation for suits claiming produce rent. The present case is also a good illustration of grossly inflated demand by the landlord and of an absurd report by a pleader-commissioner such as ought not to impose upon a circumspect judicial officer. It is probably one of many cases, distinguished from others only by the fact that the raiyat was in a position to avail himself of the lucky chance whereby the papers of the landlords which the Courts below permitted them to withhold, were forgetfully produced in Court in other litigation, to the present confusion of the landlords and their amlas. They have, however, not heard the last of the matter.

The village papers will not be returned to the plaintiffs without the special order of this Court.

JAMES, J.—I agree.

Appeal allowed.

Review granted.

FULL BENCH.

1935.

October, 16, 17.

Before Courtney Terrell, C.J., Dhavle and Agarwala, JJ.

SURENDRA KUMAR SINGH.

v.

SRICHAND NAHATA.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rules 90 and 91—execution of decree—sale of property in which judgment-debtor had no saleable interest, if a nullity—Decree-holder's remedy, if by way of application under order XXI, rule 91—Fresh execution on the ground that the decree has not been satisfied, whether maintainable.

* Appeal from Appellate Order no. 10 of 1935, from an order of Aghore Nath Banerjee, Esq., District Judge of Purnea, dated the 13th September, 1934, affirming an order of Babu Saralendu Bhusan Gupta, Munsif at Kishunganj, dated the 24th January, 1934.

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R obtained a money decree against *A* and in execution of the same purchased some lands and a note was made that the decree had been fully satisfied. Later on *R* learnt that the lands had been previously sold in execution of a rent decree and he applied for setting aside the sale under Order XXI, rule 91, but the application was rejected as being barred by limitation. *R* then applied for fresh execution on the ground that his decree was in fact not satisfied.

Held, that *(i)* a sale of immoveable property in which the judgment-debtor had no interest at the date of the sale was not a nullity in the sense of being beyond the jurisdiction of the executing court or void as between the judgment-debtor and the decree-holder auction-purchaser.

(ii) the decree-holder if he purchased the property cannot successfully maintain an application for the revival of the execution proceedings on the ground that the sale has not in fact satisfied his decree to the extent of the sale price unless he gets the sale set aside by applying under Order XXI, rule 91.

Nagendra Nath Ghosh v. *Sambhu Nath Pandey*(1), *Muthukumara Swami Pillai* v. *Muthuswami Thevan*(2), *Mundlapati Jagannadha Rao* v. *Rachapudi Basavayya*(3) and *Phulchand Ram* v. *Naurangi Lal Marwari*(4), followed.

Radha Kishun Lal v. *Kashi Lal*(5) and *Firm Ganga Ram Gulraj Ram* v. *Muktiram Marwari*(6), distinguished.

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Dhavle, J.

The case was in the first instance heard by Fazl Ali and Luby, JJ. who referred it to a larger Bench by the following judgment :—

FAZL ALI AND LUBY, JJ.—This is an appeal from a decision of the District Judge of Purnea affirming the decision of the Munsif of Kishunganj in the following circumstances :—

The respondent having obtained a decree for money against the appellant brought certain lands belonging to him to sale in execution

(1) (1924) 6 Pat. L. T. 769.
(2) (1926) I. L. R. 50 Mad. 639.
(3) (1927) 53 Mad. L. J. 255.
(4) (1935) M. A. 285 of 1934 (unreported).
(5) (1923) I. L. R. 2 Pat. 829.
(6) (1931) I. L. R. 11 Pat. 250.

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of the decree and purchased them on the 28th March, 1931. The sale was subsequently confirmed and a record was made of the fact that the decree had been fully satisfied. Subsequently the decree-holder came to know that the lands which had been purchased by him had already been sold by the landlord in execution of a rent decree and the judgment-debtor had accordingly no saleable interest in them at the date of the sale. Accordingly on the 7th January, 1933, he made an application to the court for setting aside the sale under Order XXI, rule 91. This application being obviously barred by limitation was dismissed on that ground. He, therefore, on the 13th June, 1933, made an application to the executing court to revive the execution proceedings on the ground that his decree was still unsatisfied. The petition was resisted by the judgment-debtor on the ground that the order in execution entering satisfaction of the decree, unless set aside by a court of competent jurisdiction, barred a fresh application for execution and that the decree-holder having lost his remedy under Order XXI, rule 91 could not maintain the present application. These objections, however, have been overruled by both the courts below who relying upon the decision of this Court in *Ganga Ram Gulraj Ram* v. *Muktiram Marwari*(1) have held that the sale in favour of the decree-holder was a nullity, inasmuch as the property which the court purported to sell to him had already been sold in execution of a previous decree and therefore could not pass to the decree-holder under the sale. In arguing the appeal in this Court the learned Counsel for the appellant strongly relies on the decisions of the Madras High Court in *Muthukumarswami Pillai* v. *Muthuswami Thevan*(2) and *Mandlapati Jagannadha Rao* v. *Rachapudi Basavayya*(3). The case of *Muthukumarswami Pillai* v. *Muthuswami Thevan*(2) was cited and approved of in *Phulchand* v. *Nauranga Lal Marwari*(4) decided by a Division Bench of this Court consisting of the Chief Justice and Varma, J. On the other hand the decision in *Gangaram Gulraj Ram* v. *Muktiram Marwari*(1) with reference to which the present case has been decided undoubtedly favours the view which was urged on behalf of the respondents. In these circumstances it appears to us to be desirable that this case should be referred for decision to a Full Bench and the point on which we desire it to be referred may be formulated as follows:—

Whether a sale of immovable property in which the judgment-debtor had no saleable interest at the date of the sale is a nullity and whether the decree-holder, if he purchases the property, can, without taking steps under Order XXI, rule 91 or in spite of having taken steps under that provision and failed to have the sale set aside, successfully maintain an application for the revival of the execution proceedings on the ground that the decree not being satisfied is still liable to be executed.

Let the record of the case be placed before the Chief Justice for orders.

(1) (1931) I. L. R. 11 Pat. 250.
(2) (1926) I. L. R. 50 Mad. 639.
(3) (1927) 53 Mad. L. J. 255.
(4) (1935) M. A. 285 of 1934 (unreported).

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On this reference

A. B. Mukharjee (with him *S. N. Banerjee*), for the appellant: The sale is not a nullity. That being so, the failure of the decree-holder auction-purchaser to get it set aside under Order XXI, rule 91, will be a bar to a fresh execution levied on the ground that the decree not being satisfied was still liable to be executed. Under rule 92 the sale has become absolute. The auction-purchaser's only remedy in such cases is by way of an application under rule 91.

[CHIEF JUSTICE.—"Sale" involves a transfer of property. In this case, therefore, there was no sale.]

There was undoubtedly a sale, but there was no warranty of title. The decree-holder ought to have made the necessary enquiry at the time when he made the application under Order XXI, rule 11. As soon as the sale is confirmed, the decree-holder loses his character as decree-holder and begins to occupy the position of an auction-purchaser. The decree becomes satisfied on confirmation of sale. A stranger auction-purchaser must be given the same protection as a decree-holder purchaser. But if the decree-holder can be allowed to ignore the sale and levy fresh execution, where is the corresponding remedy given to a stranger purchaser—a remedy other than that provided for by rule 91? How can it be suggested that the sale was void ab initio, when the court had jurisdiction to sell? The case of *Radha Kishun Lal* v. *Kashi Lal*(1) is opposed to the view taken by the Allahabad, Madras and Calcutta High Courts. It is also contrary to the view taken in *Nagendra Nath Ghosh* v. *Sambhu Nath Panday*(2).

Therefore in *Mathukumarswami Pillai* v. *Muthuswami Thevan*(3) the learned Judges refused to follow *Radha Kishun's*(1) case. In *Phulchand* v.

(1) (1923) I. L. R. 2 Pat. 829.

(2) (1924) 6 Pat. L. T. 769.

(3) (1926) I. L. R. 50 Mad. 639.

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Naurangi(1) a Division Bench of this Court (Courtney Terrell, C. J. and Varma J.) has followed *Muthukumarswami Pillai* v. *Muthuswami Thevan*(2). The same view has been taken in *Anand Krishna* v. *Kishan*(3), *Ram Sarup* v. *Dalpat Rai*(4), *Balavant Ranganath* v. *Bala Malu*(5), *Habibuddin* v. *Hatim Mirza*(6) and *Abinash Chandra Kar* v. *Bhuban Chandra*(7).

B. N. Mitter (with him *Syed Hasan*), for the respondent: In the last execution I purchased only a bag of wind as the judgment-debtor had no title to the property sold. There being no property of the judgment-debtor which could be sold, the sale is void. The case of *Firm Ganga Ram* v. *Muktiram*(8) is correctly decided.

I also rely on *Radha Kishun Lal* v. *Kashi Lal*(9) and *Moti Lal* v. *Karrabuldin*(10). A Court has no power to sell what has already been sold. [Reference was made to *Thakur Barmha* v. *Jiban*(11).] In *Prasanna Kumar* v. *Ibrahim Mirza*(12) a suit by the auction-purchaser for recovery of property or refund of purchase money, on the ground that the judgment-debtor had no saleable interest, was held to be maintainable without the sale being first set aside. When the property did not belong to the judgment-debtor, there was nothing to pass by the sale and therefore nothing to set aside.

[*A. B. Mukherji.*—This decision was not followed in *Bipin Behari Ghosh* v. *Haricharan*(13). The mistake which Fletcher, J. committed, namely,

(1) (1935) M. A. 285 of 1934 (unreported).
(2) (1926) I. L. R. 50 Mad. 639.
(3) (1930) I. L. R. 53 All. 496.
(4) (1920) I. L. R. 43 All. 60.
(5) (1922) I. L. R. 46 Bom. 833.
(6) (1925) I. L. R. 6 Lah. 283.
(7) (1921) 25 Cal. W. N. 756.
(8) (1931) I. L. R. 11 Pat. 250.
(9) (1923) I. L. R. 2 Pat. 829.
(10) (1897) I. L. R. 25 Cal. 179, P. C.
(11) (1913) I. L. R. 41 Cal. 590, P. C.
(12) (1917) 41 Ind. Cas. 924.
(13) (1920) 64 Ind. Cas. 628.

that he followed an earlier decision based on the old Code, was pointed out in *Banka Behari Das* v. *Guru Das*(1).]

Reliance was also placed on *Mukhram Pandey* v. *Arjun Missir*(2) and *Kedar Nath Goenka* v. *Ram Narain Lal*(3).

A. B. Mukherjee, in reply.

S. A. K.

Cur. adv. vult.

DHAVLE, J.—The appellant in this case objects to execution proceedings started afresh against him by the respondents in the following circumstances.

The respondents obtained a money decree against the appellant, and in execution of it brought certain lands of the appellant to sale in April, 1931, and themselves purchased them. The sale was confirmed in June, 1931, and a record was made to the effect that the decree had been fully satisfied by reason of the sale. Later on the respondents came to know that the lands had been previously sold in execution of a rent decree, so that at the time of the sale brought about by the respondents the appellant had no saleable interest in them. Upon this in January, 1933, they made an application under Order XXI, rule 91, for setting the sale aside. This application was obviously barred by limitation and was accordingly dismissed. About six months afterwards the respondents made an application out of which the present appeal arises, asking for fresh execution on the ground that their decree was in fact unsatisfied. The application was resisted by the appellant on the ground that the order in execution entering satisfaction of the decree, not having been set aside by any Court, was a bar to a fresh execution and that, therefore, the respondents decree-holders, who had lost their remedy under Order

(1) (1923) 28 Cal. W. N. 20.
(2) (1934) I. L. R. 13 Pat. 765.
(3) (1935) I. L. R. 14 Pat. 611, P. C.

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XXI, rule 91, were not entitled to maintain the application in question. The appellant's objection has been overruled by the lower Courts; relying upon certain observations in *Firm Ganga Ram Gulraj Ram* v. *Muktiram Marwari*(1) they have held that the sale in favour of the respondents was a nullity, inasmuch as the property which the Court purported to sell to them had already been sold in execution of a previous decree and therefore could not pass to the decree-holder under the sale. As that view was in conflict with the view taken in *Muthukumara Swami Pillai* v. *Muthuswami Thevan*(2) which was followed in *Mundlapati Jagannadha Rao* v. *Rachapudi Basavayya*(3) and in this Court in *Phulchand* v. *Naurangi Lal Marwari*(4) (decided by my Lord the Chief Justice and Varma, J.), the learned Judges before whom this appeal first came on for hearing, Fazl Ali and Luby, JJ. have made this reference to a Full Bench formulating the point for decision as follows :—

> "Whether a sale of immovable property in which the judgment-debtor had no saleable interest at the date of the sale is a nullity and whether the decree-holder, if he purchases the property can, without taking steps under Order XXI, rule 91, or in spite of having taken steps under that provision and failed to have the sale set aside, successfully maintain an application for the revival of the execution proceedings on the ground that the decree not being satisfied is still liable to be executed."

Now, it appears at the outset that the point for decision in the case of *Firm Ganga Ram Gulraj Ram*(1) was whether the executing court had properly disposed of an application for rateable distribution in ultimately dismissing it and at first ignoring it and confirming the relevant execution sale even after it had been brought to its knowledge that the judgment-debtor's property had already been sold in execution at the instance of another decree-holder. That matter is entirely different from the present case

(1) (1931) I. L. R. 11 Pat. 250.
(2) (1926) I. L. R. 50 Mad. 639.
(3) (1927) 53 Mad. L. J. 255.
(4) (1935) M. A. 285 of 1934 (unreported).

where the propriety of the order confirming the sale cannot be and is not challenged, but the decree-holder merely seeks to ignore that order as well as the order recording satisfaction of the decree on the ground that the decree has not in fact been satisfied by the sale. There cannot, of course, be any dispute that if a property has already been sold in execution of a decree, it cannot be effectively sold again in execution of another decree against the same judgment-debtor unless possibly there is a question of mortgage liens and the like. The first sale operating on the entire interest of the judgment-debtor, there would be nothing left for the second sale to operate on. A second sale would, therefore, really convey nothing to the purchaser and the question may arise [as happened in the case of *Firm Ganga Ram Gulraj Ram*(1)] whether, *vis-a-vis* the judgment-debtor, it ought to be confirmed. That, however, is not what we have to deal with in the present case: the confirmation of the sale, as I have already said, is not in question. It may be—indeed it appears to be the case—that the respondents, if they are right in saying that the property had already been sold in execution of a rent-decree obtained by the landlord, have taken nothing by the sale and that as against the prior execution purchaser they will not be entitled to the property. The sale might be a nullity in the sense that it would not operate to pass an effective title to the purchaser *vis-a-vis* the prior purchaser, but the mere absence of a saleable interest would not go to the jurisdiction of the Court that sells the property at the instance of the decree-holder, especially as there is no warranty of title in court sales. But the question that arises when a decree-holder auction-purchaser applies for a fresh execution on the ground that the sale has not in fact passed any title to him and satisfied his decree is a question between him and the judgment-debtor, and not one between him and another person against whom he has obtained no title by the sale. It is open

(1) (1931) I. L. R. 11 Pat. 250.

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to a decree-holder, who brings the judgment-debtor's property to sale in execution and purchases it himself, to apply to the Court under Order XXI, rule 91, to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property; and if he so applies within the period of thirty days prescribed for such applications, and proves that the judgment-debtor had no saleable interest, the Court will, under Order XXI, rule 92, sub-rule (*2*), make an order setting aside the sale. Such an order entitles the purchaser, under rule 93 of the same Order, to an order for repayment of his purchase money, and would, when the decree-holder himself is the purchaser, lead, if it did not amount, to an order giving him leave to proceed again with the execution, in so far as the purchase money is not depsited but set off against the decretal amount. But if the sale is not set aside on this ground (or on other grounds which are open to other parties under rules 89 and 90 of the Order), the Court has to make an order under clause (*1*) of rule 92 confirming the sale, whereupon the sale becomes absolute. Clause (*3*) of rule 92 then comes into play and debars a suit by any person against whom such order of confirmation is passed to set aside such order. The effect of this provision of the law was considered in detail by Kulwant Sahay, J. (sitting with Jwala Prasad, J. who concurred) in *Nagendra Nath Ghosh* v. *Sambhu Nath Pandey*(1). It was held in that case that " whereas under the Code of 1882 it was optional to enforce repayment of the purchase money upon setting aside of a sale by having recourse to the procedure provided for execution of a decree for money and the auction-purchaser was not limited to that remedy which was not an exclusive remedy but he could, if he so chose, bring a regular suit to enforce payment of the purchase money, under the present Code no such option is left to the auction-purchaser and his only remedy is by way of an application under Order XXI, rule 91, of the Code." The auction-purchaser, therefore, loses the purchase money

(1) (1924) 6 Pat. L. T. 769.

deposited by him—and the sale stands, though ineffective against third parties—if the judgment-debtor has no saleable interest in the property and if the auction-purchaser has lost his remedy under Order XXI. rule 91. The only possible exception to this is where the auction-purchaser can make out a case for equitable relief on the ground of fraud or the like—*see* such cases as *Rishikesh Law* v. *Manik Molla*(1) and *Basiruddin* v. *Elahi Bux*(2)—but that does not arise in the present case. On what principle, then, can it be held that the auction-purchaser is better off if he should also be the decree-holder and that in the latter capacity he can ignore the sale and take out fresh execution? Much reliance has been placed by the respondents on *Radha Kishun Lal* v. *Kashi Lal*(3) in support of the contention that as decree-holder he can do so. But that was a case where after the satisfaction of a decree by reason of an execution sale a third person had obtained a declaration of his rights to the property in a suit in which both the decree-holder and the judgment-debtor had been impleaded. Mullick, J., who delivered the judgment of the Court in the case, held that the effect of the decree in favour of the successful claimant was to set aside the sale and that no formal order to that effect was required as both the original decree-holder and his judgment-debtor were bound by the later decree. This view has been criticized in Madras in view of the finality of execution proceedings between decree-holder and judgment-debtor, but it is not now necessary to examine its soundness. For in the present case there is no adjudication in the presence of the decree-holder and the judgment-debtor which could be taken to have the effect of setting the sale aside. On the other hand, there is the sale which, being confirmed, binds the decree-holder, and further there is the record of satisfaction of the decree, which is binding on the decree-holder and cannot be ignored;

(1) (1926) I. L. R. 53 Cal. 758.

(2) (1935) A. I. R. (Cal.) 645.

(3) (1923) I. L. R. 2 Pat. 829.

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if it were not binding, there would [as their Lordships of the Judicial Committee said in *Ram Kirpal* v. *Rup Kuari*(1)] be no end to litigation. The decree-holder auction-purchaser would seem in such circumstances to have a smaller claim to consideration than a third party auction-purchaser; for while both of them purchase at their own risk, it is the decree-holder himself that brings the property to sale and he ought to see that it is still the property of his judgment-debtor, or if he makes a mistake, to discover it within the period of limitation prescribed for applications for setting sales aside. That in circumstances essentially similar to those of the present case an application for further execution is unsustainable, was held in *Muthukumaraswami Pillai* v. *Muthuswami Thevan*(2), the reasoning in which was accepted in this Court in *Phulchand* v. *Naurangi Lal Marwari*(3), the case referred to by Fazl Ali and Luby, JJ. As a matter of fact, *Muthukumaraswami's*(2) case was perhaps in one respect rather stronger in favour of the decree-holder auction-purchaser than the present case, for the property put up to sale in that case did not belong to the judgment-debtor at all; and the learned Judges held that even so, the sale was not void as between the decree-holder and the judgment-debtor and that the want of title did not entitle the decree-holder to ignore it. The learned Advocate for the respondent has pressed us to hold that the sale in the present case was a nullity,—was absolutely void—but in support of this contention he has relied on cases which only deal with the relations between an earlier and a later purchaser, and not with those between the later purchaser and the judgment-debtor himself. It is, therefore, unnecessary to refer to them in detail. The latest of the cases cited was *Kedar Nath Goenka* v. *Munshi Ram Narain Lal*(4). But in this case their Lordships of

(1) (1883) I. L. R. 6 All. 269; L. R. 11 I. A. 37.
(2) (1926) I. L. R. 50 Mad. 689.
(3) (1935) M. A. 285 of 1934 (unreported).
(4) (1935) I. L. R. 14 Pat. 611, P. C.

the Judicial Committee merely pointed out that a sale for arrears of land cess in 1914 of a property which purported to be the property of a man to whom it did not belong at that time was a nullity against an auction-purchaser of 1908 who was no party to the proceedings leading to the sale in question, and that article 12 of the Limitation Act was, therefore, no bar to the suit of the successor of the purchaser of 1908 against the cess purchaser of 1914. The sale in favour of the respondents before us may, as I have already said, have no effect whatsoever against the landlord if the latter had brought the property to sale in execution of his rent decree before the sale obtained by the respondent. But that has nothing to do with the satisfaction of the decree that has already been entered on the record and that must bar further execution unless it is set aside, as it cannot be set aside without the sale itself being set aside as between the judgment-debtor and the decree-holders auction-purchasers. The observations from *Firm Ganga Ram Gulraj Ram* v. *Muktiram Marwari*(1), on which the lower Courts have acted, were made in a case in which, as the learned Judges found, the second sale ought not to have been confirmed on the materials then before the Court. It is, therefore, unnecessary to examine them in detail on the present occasion; they could not have been meant to apply to cases like the present where the propriety of the order confirming the sale is not in question. In my opinion, the lower Courts were in error in concluding on the basis of those observations that the respondents were entitled to ignore the sale because long after the confirmation it is discovered to have brought them nothing in fact.

I would answer the question propounded by the referring Judges as follows :—

(*a*) A sale of immovable property in which the judgment-debtor has no interest at the date of the sale

(1) (1931) I. L. R. 11 Pat. 250.

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is not a nullity in the sense of being beyond the jurisdiction of the executing court or void as between the judgment-debtor and the decree-holder or auction-purchaser, and

(*b*) the decree-holder, if he purchases the property, cannot successfully maintain an application for the revival of the execution proceedings on the ground that the sale has not in fact satisfied his decree to the extent of the sale-price, unless he has the sale set aside by applying under Order XXI, rule 91.

I would accordingly allow the appeal, reverse the order of the lower Courts and dismiss the application for execution with costs in all Courts.

COURTNEY TERRELL, C.J.—I agree.

AGARWALA, J.—I agree.

Appeal allowed.

REVISIONAL CIVIL.

Before Macpherson and Khaja Mohamad Noor, JJ.

1935.

November, 6, 7, 8, 11.

JANG BAHADUR SINGH

v.

CHHABILA KOIRI.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 94 *and Order XXXIX, rules* 1 *and* 2—*Interim injunction—Penalty for disobeying—rule* 2(3), *whether governs both rules* 1 *and* 2.

The plaintiff obtained an interim injunction restraining the defendants from cutting certain trees which the defendants disobeyed whereupon the Court directed them to be detained in the civil prison. In revision it was contended on their behalf that the Munsif had no jurisdiction to punish.

* Civil Revision no. 129 of 1935, from an order of K. P. Sinha, Esq., I.C.S., Additional District Judge, Arrah, dated the 8th December, 1934, affirming an order of Babu H. P. Sinha, Munsif, First Court, Arrah, dated the 15th February, 1934.