

1985

MAHI

v.

MST. BARKATE.

TEK CHAND J.

I agree with the lower Court that the plaintiffs have failed to prove the alleged settlement.

The appeal is without force and I would dismiss it with costs.

SKEMP J.—I agree.

A. N. C.

Appeal dismissed.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

BISHEN DAS AND ANOTHER (DECREE-HOLDERS)
Appellants

versus

TULSI SHAH AND SONS (DECREE-
HOLDER), TAFAZAL HUSSAIN
SHAH AND OTHERS (JUDGMENT-
DEBTORS) } Respondents.

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Jan. 16.

Letters Patent Appeal No. 87 of 1934.

Civil Procedure Code, Act V of 1908, sections 47 (1), 73 : Order passed ostensibly under section 73, but deciding also a matter covered by section 47 (1)—whether appealable—Issue of warrant against one decree-holder to enforce payment of amount due to other decree-holders — whether legal — Practice of Subordinate Courts — consigning execution proceedings to record room and ordering attachment to continue — deprecated.

B. D. in execution of his decree attached certain houses belonging to his judgment-debtors. T. S. obtained a decree against the same judgment-debtors and in execution attached the same properties. Both execution proceedings were consigned to the record room and in both of them orders were passed that the attachment would continue. B. D. applied for sale of the attached property and with the Court's permission purchased the property himself for Rs.11,000. T. S. then applied for rateable distribution of the proceeds of the sale. The Subordinate Judge allowed this request and ordered that B. D. would not get a sale certificate unless and until he paid to T. S. his rateable share, and in a summary

execution issued a warrant of arrest against B. D. and realized Rs. 5,900 odd from him for payment to T. S. B. D. appealed to the High Court and a Single Bench dismissed the appeal on the ground that no appeal or revision lay.

Held, that the order of the Subordinate Judge was appealable as contravening the provisions of law contained in rules 92 and 94 of Order XXI, Civil Procedure Code, for although the order was ostensibly passed under section 73 of the Code, it also decided a matter covered by section 47 (1).

Shib Das v. Bulaki Mal & Sons (1) and *Hargobind Das v. Moti Chand* (2), followed.

Held also, that the issue of a warrant of arrest against B. D. for the realisation of the amount due to T. S. was illegal and that the practice of Subordinate Courts, of consigning execution proceedings to the record room without bringing them to a close, and at the same time ordering the attachment to continue, must be deprecated.

Letters Patent Appeal from the order passed by Agha Haidar J. in C. A. No.1022 of 1932 on 15th June, 1934, affirming that of Khan Ahmad Khan, Senior Subordinate Judge, Attock, at Campbellpur, dated 26th May, 1933, holding that Tulsi Shah is entitled to share in the rateable distribution and ordering that Bishen Das, decree-holder, would not get the sale certificate unless and until he paid to Tulsi Shah his rateable share.

MEHR CHAND MAHAJAN and RAM LAL ANAND II,
for Appellants.

FAKIR CHAND, for (Tulsi Shah & Sons) Respondent.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—The facts bearing upon the point of law involved in this case are these :—

Bishen Das and another obtained a money decree against Tafazal Hussain Shah and others. In execution of their decree they attached certain houses

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belonging to the judgment-debtors. Tulsi Shah also held a decree against the same judgment-debtors in execution of which he got the same property attached. Both execution proceedings were consigned to the record room and in both of them orders were passed that the attachment would continue. Some time later Bishen Das applied that the attached property be sold and further asked for permission to bid at the sale. This permission was duly granted and eventually he himself purchased the property for Rs.11,000 odd. Afterwards Tulsi Shah appeared on the scene and prayed for a rateable distribution of the proceeds of this sale. The Subordinate Judge allowed this request and passed an order to the effect that Bishen Das would not get the sale certificate unless and until he paid to Tulsi Shah his rateable share. Bishen Das and Chuni Lal appealed to this Court. The appeal came before Agha Haidar J. The learned Judge dismissed the appeal on the ground that no appeal or revision lay. It is against this order that the present appeal has been preferred.

Counsel for the appellants concedes that no appeal is competent against an order under section 73 of the Civil Procedure Code, but contends that in this case the order is not one solely under section 73, but it also falls under section 47, Civil Procedure Code, and thus an appeal lies. He argues that not only an illegal condition was attached to the order which could not be done, but the Subordinate Judge in a summary execution issued a warrant against Bishen Das and realised Rs.5,900 odd from him for payment to Tulsi Shah. Basing his arguments on the illegal action of the Subordinate Judge as indicated above he argues that the remedy by way of appeal is open to him to secure a redress of his grievances. In support of his conten-

tion he places reliance on *Shib Das v. Bulaki Mal & Sons* (1) and *Hargobind Das v. Moti Chand* (2). These authorities no doubt support the appellant and we are in full accord with the principles laid down therein.

In *Shib Das v. Bulaki Mal and Sons* (1) Coldstream J. held "that no appeal lies against an order passed wholly and simply under section 73 of the Code. But an order which does, as a fact, decide a matter covered by section 47, sub-section (1) may, although it be also passed ostensibly under section 73, be the subject of appeal."

In *Hargobind Das v. Moti Chand* (2) a Division Bench of the Allahabad High Court laid down the law as follows:—

"As between the two decree-holders against the same judgment-debtor the executing Court had no authority to pass an order that one decree-holder who has purchased the judgment-debtor's property in satisfaction of his decree should pay a certain amount to the other decree-holder. The proper order that the Court should pass when it is found that the purchaser-decree-holder is either unwilling or unable to pay the money in cash is to annul the sale and to direct the property to be sold again so that out of the sale proceeds all persons entitled to rateable distribution may be paid."

Now Order 21, rule 92, Civil Procedure Code, provides that where no application is made under rule 89, rule 90 or rule 91 * * * the Court shall make an order affirming the sale and thereupon the sale shall become absolute. Further Order 21, rule 94, enacts that where a sale of immovable property has become

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(1) 1927 A. I. R. (Lah.) 100.

(2) 1933 A. I. R. (All.) 337.

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absolute the Court shall grant a certificate specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser. The order passed by the Subordinate Judge completely ignores these provisions of law inasmuch as it imposes an onerous condition on the auction purchaser which the law does not contemplate. We do not see any reason, therefore, why the decree-holder cannot bring his case under section 47 and appeal against that order.

Counsel for the respondents admits that if there had been no question of rateable distribution in this case Bishen Das would have been competent to appeal in these circumstances. If this be so, how can Tulsi Shah's application for rateable distribution alter the nature of the remedy available to Bishen Das otherwise? The order is not one wholly and simply under section 73 and as remarked by Coldstream J. if this situation arises on account of the intervention of a rival decree-holder, section 73 of the Civil Procedure Code, will not bar the right of appeal. The order does contravene the express provision of law contained in rules 92 and 94 of Order 21, Civil Procedure Code, and is consequently appealable. We hold, therefore, that the appeal was competent and setting aside the order of the learned Judge we annul the sale and order the property to be resold with due regard to all the provisions of law applicable thereto. The appellants will get their costs throughout.

Before we close we must say that we cannot but strongly deprecate the practice of the Subordinate Courts of consigning execution proceedings to the record room without bringing them to a close and at the same time ordering the attachment to continue. This generally leads to several complications and is

a sure source of multiplying litigation. We also view with disapproval the issue of a warrant of arrest against the decree-holder for the realisation of the amount due to Tulsi Shah. This illegal course should not have been adopted to enforce the order of the Court in favour of Tulsi Shah.

A. N. C.

Appeal allowed.

APPELLATE CRIMINAL.

Before Young C. J. and Abdul Rashid J.

DHUNDA (CONVICT) Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 1508 of 1934.

Criminal Trial — Evidence of eye-witnesses — found to be wholly unreliable — whether can be corroborated by other evidence.

The Sessions Judge acquitted two out of the three persons tried by him on a charge of murder as he found the evidence of the eye-witnesses far from reliable and very untrustworthy. He, however, convicted the third accused, because there was evidence of the recovery from his house of a blood-stained chopper and a blood-stained sheet. In other words he used the evidence of recovery to corroborate the evidence which he had not relied on as against the other two. The High Court on appeal agreed with the Sessions Judge as regards the eye-witnesses and found their evidence so unreliable as to be worth precisely nothing at all.

Held, that it was impossible in law to corroborate the evidence of the eye-witnesses, as nothing cannot be multiplied or corroborated, and that the appellant must also be acquitted.

Appeal from the order of Mr. E. C. Marten, Sessions Judge, Sialkot, dated 31st October, 1934, convicting the appellant.

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