

APPELLATE CIVIL.

Before Addison and Ram Lall, JJ.

RAM CHANDAR AND ANOTHER (JUDGMENT-DEBTORS) Appellants,

versus

SARUPA (DECREE-HOLDER) Respondent.

1938

Nov. 22.

Execution Second Appeal No. 549 of 1938.

Civil Procedure Code (Act V of 1908), SS. 47, 60 (1) (c) — O. XXI, rr. 84, 90, 92 — Execution of decree — Sale in execution — Objection under S. 60 (1) (c) whether falls under S. 47 — Limitation for objection — Such objection whether competent before confirmation of sale but after attachment and auction of property.

In execution of a decree the Court ordered certain houses belonging to the judgment-debtor to be sold. After attachment of the property and auction thereof but before confirmation of the sale the judgment-debtor raised objection, *inter alia*, under s. 60 (1) (c), Civil Procedure Code, to the effect that the houses could not be attached or sold as they belonged to an agriculturist. The Court dismissed the objection on the ground that the judgment-debtor having had notice of the attachment should have objected to the sale before the auction.

Held, that a question under s. 60 (1) (c) is a question arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree within the meaning of s. 47, Civil Procedure Code, and has to be decided by the execution Court, no separate suit being competent, and no period of limitation being provided for such an application.

Held further (accepting the appeal and remanding the case for decision of the objection on merits) that the Court is competent to take notice of any objection under s. 47, Civil Procedure Code, relating to the property until the sale is confirmed as it is not till then that the sale becomes absolute and title passes.

Semble.—That such an application, as the present, cannot be made after the sale is confirmed as the sale then becomes absolute and the Court becomes *functus officio*.

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Umed v. Jas Ram (1) and *Ramchhaibar Miser v. Bechu Bhagat* (2), dissented from.

Durga Charan Mandal v. Kali Prasanna Sarkar (3), distinguished.

Dwarkanath Pal v. Tarini Sankar Ray (4), *Sheikh Murrullah v. Sheikh Burullah* (5), *Vuppulury Somasundaram v. Bhimisetti Kondayya* (6) and *Lala Ram v. Thakur Prasad* (7), relied upon.

Other case law, discussed.

Second appeal from the order of Pandit Inder Kishan Wali, Senior Subordinate Judge, Rohtak, dated 24th February, 1938, affirming that of Mr. E. Barlow, Additional Subordinate Judge, IVth Class, Rohtak, dated 13th August, 1937, dismissing the objections of the judgment-debtors.

SHAMAIR CHAND, QABUL CHAND and PARKASH CHAND, for Appellants.

FAQIR CHAND MITAL, for Respondent.

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ADDISON J.—On the 16th March, 1929, Sarupa obtained a decree for Rs.750 and costs against Ram Chandar and Ram Sarup. In execution of that decree the Court ordered on the 5th August, 1936, that certain houses should be sold on the 24th September, 1936. On the 6th October, 1936, the judgment-debtors preferred two separate objections, one under Order 21, rule 90, Code of Civil Procedure, with respect to material irregularity in publishing and conducting the sale and the other under section 60 (1) (c), Civil Procedure Code, to the effect that the houses could not be attached or sold as they belonged to an agriculturist.

The executing Court first decided the objections under Order 21, rule 90, Code of Civil Procedure, and

(1) I. L. R. (1907) 29 All. 612. (4) I. L. R. (1907) 34 Cal. 199.

(2) I. L. R. (1885) 7 All. 641. (5) (1905) 9 Cal. W. N. 972.

(3) I. L. R. (1899) 26 Cal. 727. (6) 1926 A. I. R. (Mad.) 12.

(7) I. L. R. (1918) 40 All. 680.

held that there had been no material irregularity in effecting the sale. It did not, however, then confirm the sale but proceeded to decide the objection under section 60 (1) (c), Code of Civil Procedure. This objection was ultimately dismissed on the ground that the judgment-debtors, having had notice of the attachment, should have objected to the sale before the auction took place. It was not decided on the merits whether or not the houses were exempt under section 60 (1) (c).

The appeal from the order under Order 21, rule 90, was dismissed by the Senior Subordinate Judge on 1st June, 1937: he also dismissed the appeal from the decision of the application under section 60 (1) (c) on the 13th August, 1937. Against this last decision, this second appeal has been admitted to a hearing in this Court and has been referred for decision to a Division Bench by a learned Judge of the Court. The sale was confirmed by the executing Court on the 19th April, 1937, and the sale certificate was ordered to issue on the 30th August, 1937.

Section 60 (1) of the Code of Civil Procedure runs as follows:—

“ The following property is liable to attachment *and* sale in execution of a decree, namely, * * * provided that the following particulars shall not be liable to such attachment *or* sale, namely, * * * (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him.”

It may be noted that, in the Punjab, this exemption has been amended and extended by the Punjab Relief of Indebtedness Act, but it is unnecessary to set out the terms thereof.

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It is not disputed that an objection under section 60 (1) (c), Code of Civil Procedure, falls under section 47 of the Code. It is not one that falls under the provisions of Order 21, rule 90, Code of Civil Procedure. It is, therefore, necessary to quote section 47 (1), Code of Civil Procedure, which runs as follows :—

“ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”

It is clear that a question under section 60 (1) (c) is a question arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. The objection, therefore, had to be decided by the executing Court and no separate suit would lie. No period of limitation has been fixed for an application under section 47, Code of Civil Procedure.

Order 21, rule 90, Code of Civil Procedure, runs as follows :—

“ 90 (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a ratable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

The second proviso is one which has been added in the Punjab. Under Article 166 of the Indian Limitation Act the period for an application to set aside a sale in execution of a decree under Order 21, rule 90, Code of Civil Procedure, is thirty days from the date of the sale or auction. According to Order 21, rule 92, Code of Civil Procedure, where an application under Order 21, rule 90, has been made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute. Up to that time the sale is not final.

The sole question involved in this appeal is what is the effect of these sections. An application under section 47, Code of Civil Procedure, can only be made in execution proceedings and no limitation is provided for such an application. Obviously, however, it must be made in the course of the execution. Equally obviously, it appears to me, it cannot be made after the sale is confirmed as the sale then becomes absolute and the Court is *functus officio*. After the sale is confirmed and thus has become absolute there is no further jurisdiction left in the Court with respect to that particular property, though, of course, there may be a remedy by appeal, as in the present case. Is there any reason to hold that the application must be made before the auction of the property takes place? There is nothing in the Code of Civil Procedure or any other Statute pointing to this conclusion. It is true that, under Order 21, rule 84, Code of Civil Procedure, the auction is called 'sale,' but it is equally clear that this 'sale' is not absolute until it is confirmed, though, if

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it is confirmed, title dates back to the date of the auction. It is analogous to the case of a sale deed which has no effect until it is registered. If registration never takes place it is a useless document for purposes of effecting a transfer of the property, but if registration does take place, the transaction dates back to the date of execution of the document. Again, in legal parlance, the word 'sale' denotes 'a completed transaction' and not any preliminary step towards effecting it.

This being the state of the law, it seems to me that the Court has power to take notice of any objection under section 47, Civil Procedure Code, relating to property until the sale of that property is confirmed, as it is not till then that the sale becomes absolute and title passes. It is the duty of the Court to follow the law as long as it can, *i.e.*, as long as it is not *functus officio*, and, under section 60, if the objection of the judgment-debtor is correct, the Court has no jurisdiction to sell the houses. The words of the proviso are clear that "the following particulars shall not be liable to such attachment or sale." Until, therefore, the sale becomes absolute, it is the duty of the Court to decide the objection made under section 47 to the effect that the property is not liable to sale.

The contrary view that such application should be made before sale, is based on the reasoning that, as the auction or sale has taken place, though it is not absolute and is liable to be set aside under Order 21, rule 90, Civil Procedure Code, yet an objection to its liability to be sold should be restricted to some time preceding the auction. This argument is based on the reading of Order 21, rule 92, to the effect that when the objections under Order 21, rule 90, are dismissed, the sale shall be confirmed. But section 47 is completely

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independent of the provisions of Order 21, relating to the procedure which is to govern the sale of property, and it seems to me that Order 21, rule 92, presupposes that there is no objection outstanding under section 47 of the Code. When such an objection is made, it is the duty of the Court first to decide it; especially when the objection is that the Court has no jurisdiction to sell the property, such sale being forbidden by Statute and, furthermore, the judgment-debtor being barred from raising the objection by a separate suit.

Many authorities have been referred to. The first was *Durga Charan Mandal v. Kali Prasanna Sarkar* (1). That is, however, not in point. An occupancy holding of certain judgment-debtors was sold in execution of a decree for rent. The sale was in due course confirmed under section 311 of the old Code of Civil Procedure. When an application was made under section 318 of the old Code for delivery of possession one of the judgment-debtors put in a petition, objecting to the sale on the ground that there was no saleable interest in the property, and also opposing the application of the decree-holders for possession under section 318 of the Code of Civil Procedure. It was held that the confirmation of sale was no bar to the application that was made by the judgment-debtor to have it declared that in execution of such a decree the holding could not be sold, the question being one which related to the execution, discharge, and satisfaction of the decree. This ruling goes further than I am prepared to go. As already stated, I am of opinion that the Court becomes *functus officio* when the sale is confirmed and thus becomes absolute. This is a Division Bench authority.

(1) I. L. R. (1899) 26 Cal. 727.

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Dwarkanath Pal v. Tarini Sankar Ray (1) is a decision of another Division Bench where it was held that, where in execution of a money decree an occupancy holding belonging to the judgment-debtor was sold and he had failed to raise the objection at the time of the sale that the holding was not transferable, although he had full knowledge of the execution proceedings and had full opportunity to raise the objection, it was not competent to him to resist the purchaser *after the confirmation of the sale* and that, as between himself and the purchaser, the title to the property vested in the latter on such confirmation. The principle laid down in this authority confirms the view I hold that property vests on the confirmation of the sale and up to that time there would be no bar to an objection under section 47 of the Code of Civil Procedure.

Similarly, in *Sheikh Murullah v. Sheikh Burullah* (2), it was held that the defendant, having had full knowledge of the execution proceedings and not having objected to the sale, was not competent to resist the purchaser *after confirmation of sale*. The Calcutta view is thus in favour of the appellant.

A similar view was taken by the Madras High Court in *Vuppulury Somasundaram v. Bhimisetti Kondayya* (3) where it was held that, if a judgment-debtor was aware of the execution proceedings and did not object, he was bound *by the order confirming the sale* and cannot go behind it. This also supports the view of the law which I have already set out.

There are two Single Bench decisions of the Court of the Nagpur Judicial Commissioners taking

(1) I. L. R. (1907) 34 Cal. 199. (2) (1905) 9 Cal. W. N. 972.

(3) 1926 A. I. R. Mad. 12.

different views. In *Ganpat v. Ramchandra* (1) it was held that, the proviso to section 60 (1) being mandatory and the Courts having no jurisdiction to attach or sell any of the properties specified therein, and there being no prescribed period of limitation for an application under section 60 (1) (c), the Court can entertain it and decide it on the merits in spite of the fact that it was not urged at an earlier period of the execution proceedings. This certainly supports the view already expressed that up to the date of the confirmation of the sale such application lies.

In *Sobha Khushal v. Chhaganbai* (2), it was held that such an application as the present should be made before the auction takes place. It was further held that Article 166 of the Limitation Act would apply to such an application and, as it was made more than thirty days after the auction took place, the application did not lie, being barred by time. This appeal was thus decided on two grounds. In my view Article 166 applies to an application under Order 21, rule 90, and there is no article applicable to an application under section 47, Code of Civil Procedure, though, of course such an application must be made while the Court is still seized of the proceedings.

The latest Division Bench decision of the Allahabad High Court is also in favour of the appellant—*Aidal Singh v. Khazan Singh* (3). It was said there that, even if an objection is not taken in the execution department, if the Court otherwise becomes cognizant of the fact that the property attached was the house of an agriculturist it would be its duty to withdraw the attachment.

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(1) 1930 A. I. R. (Nag.) 11. (2) 1934 A. I. R. (Nag.) 82.

(3) 1930 A. I. R. (All.) 727.

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The next Allahabad ruling, *Lala Ram v. Thakur Prasad* (1), does not apply to the present case. There the objection was raised long *after the sale had been confirmed*. It was made in answer to a suit by an auction-purchaser for possession of the property purchased. Here again, confirmation had taken place and it was not competent, in my opinion, to raise the objection. With all respect I am in agreement with this Allahabad decision.

In *Umed v. Jas Ram* (2), a Single Bench decision under section 313 of the old Code of Civil Procedure, the learned Judge simply followed *Ramchhaibar Miser v. Bechu Bhagat* (3). This last case is undoubtedly against the appellant. It was held there that an objection under the old section 244, corresponding to section 47 of the new Code, should be taken prior to the auction. The view taken was that, when the auction takes place, section 244 ceases to apply, and no questions except those relating to the publishing or conducting of the sale remain to be decided thereafter. This, with all respect, seems to me to miss the circumstance that a judgment-debtor is entitled to apply under section 47 at any time before the property has been completely disposed of and, as no suit is competent, the judgment-debtor is barred by this artificial interpretation of the Code from raising what, under the law, he is entitled to raise so long as the property has not been absolutely sold.

Reliance was placed by counsel for the respondent on *Pandurang Balaji v. Krishnaji Govind* (4) but that is not in his favour. There again a house had been sold in execution of a decree and *the sale had been*

(1) I. L. R. (1918) 40 All. 680.

(3) I. L. R. (1885) 7 All. 641.

(2) I. L. R. (1907) 29 All. 612.

(4) I. L. R. (1904) 28 Bom. 125.

confirmed and had thus become absolute. In the subsequent suit by the purchaser to recover possession of the house it was pleaded that it belonged to an agriculturist and could not be sold. With all respect, in my judgment, it was properly decided that this plea could not be raised as it could only be raised by an application in execution and not by a suit or as a defence to a suit.

A Single Bench held in *Sakharlal Jamna Das v. Jerbai Sorabji Patel* (1) that such an objection as the present should have been raised prior to the auction. No reasoning is given and no authority is relied on: probably *Pandurang Balaji v. Krishnaji Govind* (2) was not referred to as it was not in point. Besides, the learned Judge found that there was no evidence to show that the house in question was actually in occupation of the judgment-debtor so that on the merits he held that section 60 (1) (c) did not apply. This judgment is, therefore, of no help.

Apart, therefore, from the decision in *Ramchhaibar Miser v. Bechu Bhagat* (3), the trend of authority is decidedly in favour of the view that such an application as the present can be made prior to confirmation of the sale.

I come now to the decisions of this Court, all of which are by Single Benches. It was held in *Jita Singh v. Ganpat Rai* (4) that such an objection as the present should be taken prior to the auction. The learned Judge relied on *Dwarkanath Pal v. Tarini Sankar Ray* (5), *Ramchhaibar Miser v. Bechu Bhagat* (3), *Lala Ram v. Thakur Prasad* (6) and *Pandurang Balaji v. Krishnaji Govind* (2). As already pointed

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(1) I. L. R. (1934) 58 Bom. 564. (4) 1930 A. I. R. (Lah.) 106.
 (2) I. L. R. (1904) 28 Bom. 125. (5) I. L. R. (1907) 34 Cal. 199.
 (3) I. L. R. (1885) 7 All. 641. (6) I. L. R. (1918) 40 All. 680.

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out the only authority out of those quoted, in favour of that view is *Ramkhaibar Miser v. Bechu Bhagat* (1).

Another learned Judge held in *Alam Khan v. Anjuman Imdad Bahmi Qarza* (2) that such an objection as the present was barred if it was made after the sale by virtue of the second proviso to Order 21, rule 90, Code of Civil Procedure, as amended by the Lahore High Court. But it is clear that this second proviso only relates to what lies within Order 21, rule 90, C. P. C., that is, to matters in connection with publishing or conducting the sale. It has, and can have no application to a question raised under section 47 of the Code of Civil Procedure.

It was said by another learned Judge of this Court in *Mohammad Din v. Hirda Ram* (3) that a Court is empowered to entertain an objection at any time and decide it on the merits; even though it was not raised at a preliminary stage, that fact would not cause such an objection to be barred by the principle of *res judicata*. This decision is not on all fours with the present case but it lends support to the view already expressed. It is a decision similar to that in *Ganpat v. Ramchandra* (4).

Another case came before the same Judge in *Fatta v. Sham Sunder* (5) in which he held that objections under section 60 (1) (c) cannot be dismissed on the ground that they were belated as there was no prescribed period of limitation within which such objections could be put in. In this instance, however, the objections were put in two days before the sale took place, so that the case is scarcely in point.

The last case referred to is *Ram Chand v. Co-operative Society of Kharar* (6). That also is not on

(1) I. L. R. (1885) 7 All. 641.

(2) 1937 A. I. R. (Lah.) 309.

(3) 1935 A. I. R. (Lah.) 942.

(4) 1930 A. I. R. (Nag.) 11.

(5) (1936) 38 P. L. R. 669.

(6) (1936) 38 P. L. R. 691.

all fours with the present case. The judgment-debtor raised objections to the attachment and sale under section 60 (1) (c) and thereafter made a statement that he would pay the decretal amount by a certain date, failing which his objections would stand dismissed. Payment was not made and his objections were dismissed. When the execution proceedings were revived, the judgment-debtor repeated the objections and the Courts below held that the judgment-debtor was precluded by the principle of *res judicata* from raising them over again. The learned Judge of this Court held that it was not so barred and went on to point out that the provisions of section 60 (1) (c) were mandatory and the Court was bound to withdraw the attachment, even if no objections were put in, if the Court had otherwise become cognizant that the houses attached were the property of an agriculturist, and were by Statute not liable to attachment and sale. He added that the policy of the Legislature was made clear by the Punjab Relief of Indebtedness Act. Though this case is not on all fours with the present, the principles apply in support of the view I have taken.

For the reasons given, I have no hesitation in holding that this appeal must succeed as the objections were put in before the sale was confirmed: it then became the duty of the Court to see if it had jurisdiction to sell the property. If it had no jurisdiction, it was its duty to end the execution proceedings by refusing to confirm the sale which so far had not become absolute.

I would, therefore, accept this appeal, set aside the order of the Courts below, and remand the case to the execution Court for a decision on the merits whether the houses in question are or are not liable to

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attachment and sale under section 60 (1) (c) of the Code of Civil Procedure, and section 35 of the Punjab Relief of Indebtedness Act (VII of 1934). I would leave the parties to bear their own costs in this Court and the lower appellate Court. The costs in the executing Court will be in the discretion of that Court.

RAM LALL J. RAM LALL J.—I agree.
 A. N. K.

Appeal accepted.

APPELLATE CIVIL.

Before Addison and Ram Lall. JJ.

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 Feb. 2.

WASTI RAM-GURDITTA MAL, AND OTHERS
 (AUCTION-PURCHASERS) Appellants,

versus

MST. GANESHI (JUDGMENT-DEBTOR) Respondent.

Second Appeal from Order No. 31 of 1938.

Civil Procedure Code (Act V of 1908), S. 47, O. XXI, rr. 90, 92 — Execution of decree — Property sold in execution — Sale confirmed — objection after confirmation — Whether competent under S. 47.

Held, that when a property has been sold in execution and the sale has been confirmed the Court becomes *functus officio* and an objection with respect to the property sold, as in the present case, cannot be taken under s. 47, Civil Procedure Code, after confirmation of the sale.

Kedar Nath v. Arun Chandra Sinha (1) and *Ram Chandar v. Sarupa* (2), followed.

Nanhelal v. Umrao Singh (3), distinguished.

Second appeal from the order of Lala Ram Rang, Senior Subordinate Judge, Attock at Campbellpur, with appellate powers, dated 8th June, 1938, reversing that of Sardar Sahib Thakar Bhagwan Das.

(1) I. L. R. [1937] All. 921 (F. B.). (2) I. L. R. [1939] Lah. 103.

(3) 1931 A. I. R. (P. C.) 33.