

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Heaton.*

BALGAUDA LAXMANGAUDA PATIL (ORIGINAL DEFENDANT), APPELLANT  
*v.* MALLAPPA VIRUPAXAPPA TURCHI (ORIGINAL PLAINTIFF),  
 RESPONDENT.\*

*Civil Procedure Code (Act V of 1908), section 47, Order XXI, Rule 92 (1)—  
 High Court Manual Rules 16 (2) and 17—Decree—Execution—Sale—  
 Auction-purchaser—Application to Collector to set aside sale—Collector  
 bound to refer application to Civil Court—Suspension of Collector's power  
 to confirm sale till disposal of application—Remedy by a separate suit.*

Once an application is made within the time limited by law to the Collector to set aside a sale, the Collector is bound to refer the application to the Court and all his powers of confirming the sale are suspended until the disposal of the application.

In execution of a decree, the property in suit was sold by the Collector and purchased by an outsider. The plaintiff judgment-debtor deposited the money with the Collector under Order XXI, Rule 89, Civil Procedure Code, 1908 and applied to him in time to set aside the sale. In spite of the application the Collector proceeded to confirm the sale. The plaintiff having sued to set aside the sale, the contention was raised that the plaintiff should have proceeded in execution under section 47 of the Civil Procedure Code, 1908.

*Held*, that section 47 of the Civil Procedure Code, 1908, did not apply because the decree-holder in the suit in which execution was asked for was not a party to the proceedings, which were purely between the judgment-debtor and the auction-purchaser who was an outsider to the original suit.

It is only when questions arise between the parties to the suit in which the decree was passed or their representatives, that those questions must be determined by the Court executing the decree, and not by a separate suit.

SECOND appeal against the decision of S. R. Koppikar, First Class Subordinate Judge, A. P., at Belgaum, confirming the decree passed by A. K. Asundi, Subordinate Judge at Gokak.

Suit to recover possession.

\* Second Appeal No 293 of 1917.

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In execution of a decree in Suit No. 522 of 1910, the plaintiff property was sold by the Collector of Belgaum on the 8th April 1915. It was purchased by one Balgauda for Rs. 2,200 and the amount was produced before the Collector on the 18th May 1915.

On the 12th April 1915, the judgment-debtor paid Rs. 473-6-6 and Rs. 27-8-0 as 5 per cent. on the one-fourth purchase money to the Collector and applied to set aside the sale. The Collector issued a notice to the effect that 5 per cent. on the auction price should be produced. The judgment-debtor produced Rs. 82-2-0 before the Mamlatdar on the 27th April 1915, and applied again on the 30th April 1915 to set aside the sale.

The Collector, in spite of the judgment-debtor's application, confirmed the sale on the 4th June 1915.

The plaintiff, judgment-debtor, therefore, brought a suit against Balgauda, the auction-purchaser, to set aside the sale.

The defendant contended that the sections and rules of the Civil Procedure Code did not apply to sales held before the Collector; that the application to set aside the sale could not be made to the Collector; that the Collector had no authority to set aside the sale; that the application ought to have been made to the Court within 30 days of the sale after producing amounts and that the defendant had taken the  $\frac{3}{4}$ th amount to the Mamlatdar's Office within 15 days, which the Mamlatdar refused to accept.

The Subordinate Judge held that, in conformity with the provisions of Order XXI, Rule 89, Civil Procedure Code, 1908, the judgment-debtor had produced the required amount before the Collector and had applied to him in time to set aside the sale; that it was not

legal for the Collector to have confirmed the sale, without directing the applicant to the civil Court and until the civil Court had decided his application; and that it was not legal to have received the 2<sup>nd</sup> amount from the defendant auction-purchaser after the expiry of 15 days of the sale. On these grounds, the Subordinate Judge set aside the sale and awarded plaintiff's claim for possession.

On appeal, the First Class Subordinate Judge, A. P., confirmed the decree.

The defendant appealed to the High Court.

*S. R. Parulekar* for *A. G. Desai*, for the appellant:—

An application was made within 30 days to the Collector to set aside the sale, but in spite of it the Collector confirmed that sale. Under section 71, Civil Procedure Code, the Collector is a Court said to be acting judicially; and under Order XXI, Rule 92 (3) the Collector's refusal to set aside the sale is an order of the Court and no suit shall lie. Further, it was the duty of the party to file an application in the civil Court. If he chose his remedy in the wrong Court he had only to thank himself. Rule 17 at page 106 of the High Court Manual ought to be read along with section 71 and Order XXI, Rule 92, Civil Procedure Code, 1908.

Secondly, the plaintiff, an auction-purchaser, ought to have proceeded under section 47 of the Civil Procedure Code. He cannot bring a separate suit. Section 47 ought to be construed very liberally so as to bring a case of an auction-purchaser within its purview. It is a question relating to execution, discharge and satisfaction; and it is of the utmost importance that all objections to execution-sale should be disposed of as cheaply and as speedily as possible.

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I submit then that a separate suit cannot lie, as it is barred by section 47, Civil Procedure Code, 1908.

*S. B. Bakhale*, for the respondent not called upon.

MACLEOD, C. J.:—The decree of the lower appellate Court is perfectly correct. The facts are set out at page 2. The learned Judge has properly appreciated the rules which refer to the case. When a decree has been transferred to the Collector for execution, and he has put up the property for sale, and it has been sold, then he has a certain power to confirm the sale. That is given to him by Rule 16 (2) at page 106 of the High Court Manual which says: "The power referred to in paragraph 1 of section 312 of the Civil Procedure Code of 1882 [present Order XXI, Rule 92 (1) of the Code of 1908], to pass an order confirming a sale if no application to set the sale aside has been made within the time limited by law, or if every application so made has been disallowed"; and Rule 17 provides that the application to set aside a sale, if it is made within the time limited by law to the Collector, shall be referred to the civil Court. It follows then that once an application is made within the time limited by law to the Collector to set aside the sale, the Collector is bound to refer the application to the Court, because he has no power whatever to deal with that application himself. But as soon as the application is made to him within the time limited by law, which is 30 days from the date of the sale, then all his powers of confirming the sale are suspended until that application has been disposed of. In this case he appears to have ignored the application to set aside the sale and proceeded to confirm it. In so doing, he was acting clearly *ultra viros*, and the suit will lie for a declaration in favour of the plaintiff that the sale is void.

It has been argued that the plaintiff should have proceeded in execution under section 47 of the Code.

That section will not apply in this case, because the decree-holder in the suit in which execution was asked for is not a party to these proceedings, and it is only when questions arise between the parties to the suit in which the decree was passed, or their representatives, that those questions must be determined by the Court executing the decree, and not by a separate suit. Here the decree-holder was not a party nor the representative of a party. The judgment-debtor deposited the money with the Collector or the Mamlatdar, and then proceeded to ask the Collector to set aside the sale. The only questions which arose were purely between himself and the auction-purchaser who was an outsider to the original suit, and was neither a party nor a representative of any of the parties. Therefore the decree of the lower appellate Court was perfectly correct and the appeal must be dismissed with costs.

HEATON, J. :—I concur.

*Decree confirmed.*

J. G. R.

## ORIGINAL CIVIL.

*Before Mr. Justice Pratt.*

MURADALLY SHAMJI (PLAINTIFF) v. B. N. LANG (DEFENDANT)\*.

*Presidency Towns Insolvency Act (III of 1909), sections 38 (b), 52 (2) (a)—Arjudicated insolvent—Order suspending discharge but providing that the insolvent be discharged at the end of the suspension period—Order under section (38) (b) and in form prescribed by the High Court Rules operates as a discharge under the Act—Practice of the High Court requiring appearance of the insolvent to obtain a final order of discharge, illegal—The English Bankruptcy Act, 1842 (5 & 6 Vict. c. 122)—Civil Procedure Code (Act V of 1908), section 80—Suit against Official Assignee for injunction to restrain threatened and imminent injury to property—Notice not necessary.*

\* O. C. J. Suit No. 339 of 1918.

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