

APPELLATE CIVIL.

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

VITHALDAS PRABHU AND ANOTHER (ORIGINAL APPLICANT), APPELLANTS
v. SUBRAYA MANJAPPA AND OTHERS (ORIGINAL OPPONENTS), RES-
PONDENTS*.

1920.

July 13.

*Civil Procedure Code (Act V of 1908), Order XXI, Rule 53—Decree—
Execution—Decree in favour of judgment-debtor attached—Sale of decree—
Wrong procedure.*

In execution of a decree for Rs. 449, the decree-holder attached a mortgage-decree in favour of his judgment-debtors under Order XXI, Rule 53, Civil Procedure Code, 1908. The Court put up the decree for sale and it was purchased by the decree-holder for Rs. 200. The decree-holder having applied for execution of the balance of the decretal debt, the judgment-debtor contended that under the attached decree the decree-holder realized Rs. 600 which was much more than what was due on the decree which was sought to be executed and prayed that the Darkhast be struck off.

Held, dismissing the Darkhast,

(1) that the decree attached ought not to have been put up for sale ;

(2) that under Order XXI, Rule 53, the procedure to be followed when a decree either for the payment of money or for sale in enforcement of a mortgage or charge is attached, the Court should under sub-rule (2) on the application of the creditor who had attached the decree of the judgment-debtor proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

SECOND appeal against the decision of E. H. Leggatt, District Judge of Kanara, confirming the decree passed by B. G. Kalkot, Subordinate Judge of Sirsi.

Proceedings in execution.

In suit No. 119 of 1911, a money decree was passed in favour of the plaintiff for Rs. 449.

In execution of the decree, the decree-holder attached a mortgage decree obtained by defendants judgment-debtors in Suit No. 311 of 1906. The attachment was

* Second Appeal No. 244 of 1917.

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made under Order XXI, Rule 53, Civil Procedure Code, 1908. The attached decree was sold and bought by decree-holder with the permission of the Court for Rs. 200. Part satisfaction of the decree was noted. Notice of sale was issued against defendants Nos. 1 and 3. It was served on defendant No. 1 who appeared to get the sale set aside. Defendant No. 3 was not served with the notice. Notice to him was left with defendant No. 1 who was not authorised to accept it.

Under the attached decree, the decree-holder realised Rs. 600 out of Court. He however presented a Darkhast for the balance of the decretal debt on giving credit for Rs. 200 which were realised by the sale of the attached decree.

The judgment-debtors contended that the decree was satisfied by the realization made by the decree-holder under the decree in Suit No. 311 of 1906.

The Subordinate Judge held that the sale of the decree in Suit No. 311 of 1906 was perfectly in contravention of the provisions of Order XXI, Rule 53, Civil Procedure Code, 1908, that the judgment-debtors were entitled to that amount of Rs. 600 realised by the decree-holder under the decree in Suit No. 311 of 1906 as payment on the decree sought to be executed and that the contentions of the judgment-debtors were not barred by *res judicata* by reason of the notice being not served on defendant No. 3. He, therefore, dismissed the Darkhast.

On appeal, the District Judge confirmed the decree.

The decree-holder appealed to the High Court.

Nilkant Atmaram, for the appellants.

S. N. Karnad, for respondent No. 2.

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MACLEOD, C. J.:—This is an appeal under section 47 of the Civil Procedure Code. The 3rd defendant in Suit No. 119 of 1911 prayed that the decree-holders realized much more than what was due on the decree which was sought to be executed, and prayed that the Darkhast should be struck off. The application has been granted in both the lower Courts. What had happened was this. In execution of their decree the decree-holders attached the mortgage decree in favour of their judgment-debtors. Order XXI, Rule 53, lays down the procedure to be followed when a decree, either for the payment of money or for sale in enforcement of a mortgage or charge is attached, the Court shall under sub-rule (2) on the application of the creditor who has attached the decree of the judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. Instead of doing that the Court put up the decree for sale, and the decree was purchased for Rs. 200 by the decree-holder. These proceedings were absolutely wrongly conceived, and certainly it is very strange that in the face of Order XXI, Rule 53, the Court should have allowed such a sale to take place. Then the decree-holder having become the purchaser of the decree proceeded to recover what he could on the decree and realized Rs. 600. Obviously there is no equity whatever in favour of the decree-holder who seeks to pocket Rs. 400 which really belonged to his judgment-debtor.

But it has been argued that the matter which has been dealt with by the lower Courts is *res judicata* because the 1st defendant has endeavoured to stop the sale, and on his application it was held that the sale was valid. The 3rd opponent was not served with notice of that application. An order was obtained from the Court either that the notice might be served on

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the 1st opponent, or if he refused to accept it, that substituted service should be effected. The 1st opponent accepted service of the notice. But that cannot be taken as service on opponent No. 3 who has not been proved to have been living with opponent No. 1 at the time. It is quite possible that if opponent No. 1 had not accepted service, then substituted service, according to the provisions of the Code, would have been effected. Then opponent No. 3 would be bound by it. But all that we have before us is that notice was served on some one who did not represent the 3rd opponent. Therefore he cannot be considered as being bound by the decision in the matter. That is sufficient to dispose of the appeal, because, in my opinion, it is perfectly clear the appellants cannot take advantage of the wrong procedure which was adopted by the Court in order to put money in their pocket which really belonged to their judgment-debtor. What would have happened if an out-sider had purchased the decree is a question which need not be gone into. The appeal is dismissed with costs.

FAWCETT, J. :—I concur.

Decree confirmed.

J. G. R.

CRIMINAL REFERENCE.

Before Mr. Justice Shah and Mr. Justice Crump.

EMPEROR v. ALIBHAI ABDUL*.

1920.

July 17.

Criminal Procedure Code (Act V of 1898), section 345—Compounding of offences—Composition with one accused does not mean acquittal of others.

The compounding of an offence with one out of many accused has not the effect of acquittal of the remaining accused persons between whom and the complainant no satisfactory settlement has been arrived at.

* Criminal Reference No. 39 of 1920.