

CIVIL REVISION.

Before Mr. Justice Mirza and Mr. Justice Broomfield.

HIRALAL MOHANLAL MUTHA (ORIGINAL DEFENDANT No. 2), PETITIONER *v.*
RAMCHANDRA KUNDANMAL MARWADI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), OPONENTS.*

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February 7.

Civil Procedure Code (Act V of 1908), sections 47, 115 and Order XXI, rules 2, 95, 97, 98, 103—Auction-purchaser—Application to recover possession of house locked—Putting of lock amounts to resistance—Plea of satisfaction of decree—Application not a proceeding in execution, discharge or satisfaction of decree—Order dismissing application—No appeal from the order—High Court—Revisional jurisdiction.

A decree-holder purchased the house of the judgment-debtor at a Court sale in execution of his decree. After the sale certificate was issued to him the decree-holder sought to recover possession of the house but he found it locked. Thereupon he applied to the Court to have the lock removed. On notice being issued to the judgment-debtor he contended that under a compromise the decree-holder had agreed to allow him to retain possession of the house on payment of a certain amount. The Subordinate Judge upheld the contention and rejected the application. On appeal, the District Judge held that the compromise amounted to an adjustment of the decree out of Court and could not be recognised because it had not been certified as required by Order XXI, rule 2, of the Civil Procedure Code, 1908. He therefore set aside the order and directed the Subordinate Judge to proceed under Order XXI, rule 95, of the Civil Procedure Code. The judgment-debtor having applied to the High Court in revision :

Held, (1) that the locking up of the house amounted to resistance or obstruction and the auction-purchaser was entitled to apply to the Court to have the lock removed, under Order XXI, rule 97, of the Civil Procedure Code, 1908 ;

(2) that an order dismissing the application could be passed under rule 98, and the provisions of Order XXI, rule 103, made the order conclusive subject to the result of a separate suit :

Zipru v. Hari Supdushet,⁽¹⁾ applied ;

(3) that the application made by the decree-holder, who was also the auction-purchaser, to get possession of the property, was not a proceeding in execution of the decree and no appeal lay under section 47 of the Civil Procedure Code, 1908, against the order dismissing the application :

Hargovind Fulchand v. Bhudar Raoji,⁽²⁾ followed ;

(4) that as the proceedings were not in execution of a decree the Court to which the application was made could take into consideration the adjustment pleaded by the judgment-debtor and Order XXI, rule 2, had no application ;

(5) that the High Court could entertain the application under section 115 of the Civil Procedure Code, 1908.

Per *Broomfield, J.* :—There is no inflexible rule that the High Court will not interfere in revision when a remedy by suit is open. It depends upon the

*Civil Revision Application No. 321 of 1928.

⁽¹⁾ (1917) 42 Bom. 10.

⁽²⁾ (1924) 48 Bom. 550.

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circumstances of the particular case. If the case comes within the scope of section 115 of the Civil Procedure Code, 1908, and if there are sufficiently strong reasons for interference, the Courts may and do interfere.

CIVIL Revision application for setting aside the order passed by Dadiba C. Mehta, District Judge, Ahmednagar, reversing the order passed by D. V. Deshmukh, Subordinate Judge of Shevgaon.

The material facts are set out in the judgments.

D. R. Manerikar, for the petitioner.

J. G. Rele, for opponent No. 1.

MIRZA, J. :—This is an application for revision of an order of the District Court of Ahmednagar reversing the order of the Second Class Subordinate Judge, Shevgaon. The main ground in support of the application for revision is that the District Court in maintaining an appeal from the order of the Subordinate Judge exercised a jurisdiction which was not vested in it by law.

The facts found by the District Judge are set out in his judgment as follows : “ The appellant decree-holder purchased the house of the respondent No. 2 judgment-debtor at a Court auction for the amount of the decree. The sale certificate was issued to the appellant in due course. When, however, he sought to take possession of the house he found it locked and hence came to the Court to have the lock removed. A notice was issued for this purpose to the judgment-debtor who appeared in the Court and put forward the plea that he had arrived at a compromise with the appellant whereunder the appellant was to receive Rs. 1,000 and give up his claim to the house. The learned Subordinate Judge upheld this defence and rejected the Darkhast with costs. Hence this appeal.”

On these facts the District Judge came to the conclusion that the applicant judgment-debtor's plea before the

Subordinate Judge amounted virtually to relying on an adjustment of the decree out of Court. Following the ruling of this Court in *Ganesh v. Yeshwant*,⁽¹⁾ the learned Judge held that as the adjustment of the decree had not been certified and the time for obtaining such certificate had since expired and it could not be relied on, the proper course for the lower Court to adopt would be to follow the proceedings prescribed under Order XXI, rule 95, of the Civil Procedure Code. He remanded the matter to the Subordinate Judge and directed that it should be dealt with under Order XXI, rule 95.

From the facts found, the conclusion arrived at by the District Judge does not appear to be justified. The opponent, the judgment-creditor, having with leave of the Court purchased the applicant's property at a Court auction sale held in execution of his decree, a Full Bench of our High Court has held in the case of *Hargovind Fulchand v. Bhudar Raoji*⁽²⁾ that the claim of such a purchaser to possession of the property purchased would not relate to the execution, discharge or satisfaction of the decree so as to make the provisions of section 47 of the Civil Procedure Code applicable to him. We are governed by this ruling. The proceedings taken by the opponent before the Subordinate Judge would be either under Order XXI, rule 95, or under Order XXI, rules 97-98. The attempt made by the opponent in the first instance, to obtain possession of the property after the auction sale and the certificate, appears to have been one out of Court and not by virtue of any order of the Court in that behalf under Order XXI, rule 95. The opponent met with resistance inasmuch as he found the house locked. That being so, he would be entitled under Order XXI, rule 97, to make an application to the Court complaining of the resistance or obstruction. The application made

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⁽¹⁾ (1922) 25 Bom. L. R. 247.⁽²⁾ (1924) 48 Bom. 550.

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by the opponent to the Subordinate Judge does not state that it was being made under Order XXI, rule 95, or under Order XXI, rule 97, but the procedure adopted by the Subordinate Judge on the application seems to conform to Order XXI, rule 97, and not to Order XXI, rule 95. Under rule 97(2) the Court has to fix a day for investigating the matter and summon the party against whom the application is made to appear and answer the same. The applicant it appears was summoned to appear and answer the allegations made against him on a day which was fixed for investigating the matter. Order XXI, rule 98, provides that where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor . . . it shall direct that the applicant be put into possession of the property . . . It follows from the language of this rule that where the Court is empowered to make an order when it is satisfied that the resistance or obstruction was occasioned without any just cause, it is also empowered by necessary implication to refuse the order when a just cause for resistance or obstruction is found to exist. The Subordinate Judge refused to interfere with the applicant's possession because he was satisfied that there was at that date a valid agreement subsisting between the parties whereby the opponent had agreed to leave the applicant in possession of the property and to convey the same to him in consideration of the payment by the applicant to the opponent of a sum of Rs. 1,000 in two instalments of Rs. 600 and Rs. 400, the first of such instalments having been already paid. The order applied for by the applicant being refused under Order XXI, rule 98, the provisions of Order XXI, rule 103, make the order conclusive leaving it open to the aggrieved party to institute a suit to establish the right which he claims to the possession of the property.

Having regard to the provisions of Order XXI, rule 98, the District Judge in my judgment was not competent to entertain the appeal from the order made by the Subordinate Judge. The order of the District Court should be reversed and that of the Subordinate Judge restored with costs throughout.

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BROOMFIELD, J. :—The facts which have given rise to this revision application are as follows: One Ramchandra Kundanmal Marwadi having brought a suit on a mortgage against Hiralal Mohanlal and his step-brother Dagdu, and having obtained a decree for sale of the mortgaged property, a house, purchased the house himself, with the permission of the Court, for the amount of the mortgage debt, Rs. 1,631. The sale was confirmed on July 19, 1926, and on August 28, 1926, the decree-holder auction-purchaser applied to the Court to be put in possession. Notice was issued to the judgment-debtors, and on February 10, 1927, Hiralal appeared and stated that a compromise had been effected between the decree-holder and himself, on or about October 23, 1926, according to which he was to pay and had in fact paid Rs. 600 to the decree-holder then, and promised to pay a further sum of Rs. 400 in June 1927, and the decree-holder agreed to give up his claim to the house and to reconvey the same. Evidence was called to prove the compromise, the Court found it to be a fact, and the decree-holder's application for possession was dismissed. Ramchandra then appealed to the District Court, and the District Judge, holding that the compromise amounted to an adjustment of the decree out of Court, which could not be recognised because it had not been certified to the Court as required by Order XXI, rule 2, set aside the lower Court's order. The judgment-debtor Hiralal now comes to this Court under section 115 of the Code and

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prays that the order of the District Judge should be revised.

In support of the application Mr. Manerikar contends that the District Judge acted without jurisdiction inasmuch as no appeal lay from the order of the Subordinate Judge dismissing Ramchandra's application of August 28, 1926; that application was one under Rule 97 of Order XXI, the order must be taken to have been passed under Rule 98, and was conclusive under Rule 103, subject to the result of any suit which may be filed by Ramchandra; that even if the application be taken to have been made, and the order passed, under Rule 95 of Order XXI, still no appeal lay, because the sale in execution put an end to the decree, the subsequent proceedings were not proceedings in execution, and therefore there could be no appeal under section 47 of the Code; and lastly that, as the Subordinate Judge who held the proceedings in question was not a Court executing a decree, Order XXI, rule 2, had no application.

I think these contentions are sound and must be upheld.

The principal question obviously is whether the application made by the decree-holder, who was also the auction-purchaser, to get possession of the property was a proceeding in execution, that is whether it related to the execution, discharge or satisfaction of the decree. Now that is a question as to which the High Courts have differed, and as to which some of the High Courts have taken different views at different times. It is not necessary, I think, to quote the cases; it will be sufficient to refer to the discussion of them in Mulla's Code under section 47. Our own High Court formerly, in *Sadashiv bin Mahadu v. Narayan Vithal*,⁽¹⁾ held that section 47 applied in such a case and that a decree-holder

⁽¹⁾ (1911) 35 Bom. 452.

purchaser, if resisted by the judgment-debtor in getting possession of the property, could only proceed by application under Order XXI and had no remedy by suit. But *Sadashiv bin Mahadu v. Narayan Vithal*⁽¹⁾ was overruled by a Full Bench in *Hargovind Fulchand v. Bhudar Raoji*,⁽²⁾ in which it was held, following *Bhagwati v. Banwari Lal*,⁽³⁾ that where a decree-holder who has purchased the property at a Court-sale seeks to get possession he does not do so in execution of his decree but by virtue of the title acquired as purchaser, and his claim based on such title does not relate to the execution, discharge or satisfaction of the decree and is outside the scope of section 47 of the Code. So far as we are concerned that settles the matter. It is useless for the opponent to rely on cases of other High Courts, e.g., *Veyindramuthu Pillai v. Maya Nadan*⁽⁴⁾ or *Askaran Baid v. Raghunath Prasad*,⁽⁵⁾ in which the question has been decided in a different way.

If the proceeding in question was not a proceeding in execution it makes no practical difference whether the Subordinate Judge's order was passed under Rule 98 or under Rule 95, for in neither case would there be any appeal, and in neither case would Order XXI, rule 2, apply so as to debar the Court from recognizing an uncertified adjustment. But I take it to be an application under Rule 97 rather than under Rule 95. The house had been locked by the judgment-debtor and that seems to me to amount to resistance or obstruction within the meaning of Rule 97. In *Sobha Ram v. Tursi Ram*,⁽⁶⁾ cited by Mr. Rele for the opponent, no specific act of resistance or obstruction was alleged, and moreover the application there was expressly described as being one under Rule 95. If the application was under

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⁽¹⁾ (1911) 35 Bom. 452.

⁽²⁾ (1924) 48 Bom. 550.

⁽³⁾ (1908) 31 All. 82.

⁽⁴⁾ (1919) 43 Mad. 696.

⁽⁵⁾ (1925) 4 Pat. 726.

⁽⁶⁾ (1924) 46 All. 693.

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Rule 97, the order must be taken to have been passed under Rule 98, even though it was an order dismissing the application: *Zipru v. Hari Supdushet*.⁽¹⁾ That case was actually concerned with an order of dismissal under Rule 101, but the reasoning applies equally to one under Rule 98. If the order was under Rule 98 it is expressly made conclusive, subject to a suit, by Rule 103.

Failing everything else Mr. Rele urged that it is not a case for interference in revision, and relies on *Irbasappa v. Basangowda*.⁽²⁾ But there is no inflexible rule that the High Court will not interfere in revision when a remedy by suit is open. It depends on the circumstances of the particular case. If the case comes within the scope of section 115 (and this case certainly does, for the District Judge had no jurisdiction to make the order he did), and if there are sufficiently strong reasons for interference, the Courts may and do interfere. *Buddhu Misir v. Bhagirathi Kunwar*⁽³⁾ was a case rather similar to this in which interference was held to be justified. On the merits, taking the facts as they have been found, the petitioner is entitled to possession on the strength of his agreement with the auction purchaser: *Bapu Apaji v. Kashinath Sadoba*⁽⁴⁾ and *Venkatesh Damodar v. Mallappa Bhimappa*.⁽⁵⁾ It would be unreasonable and unjust in my opinion that he should be driven to file a suit against the opponent, who is trying to back out of his agreement.

I would set aside the order of the District Judge and restore that of the Subordinate Judge, allowing the petitioner his costs both in the District Court and here.

Per Curiam.—The order of the District Court reversed and the order of the Subordinate Judge restored with costs throughout.

Order set aside.

J. G. R.

⁽¹⁾ (1917) 42 Bom. 10.

⁽²⁾ (1919) 44 Bom. 595.

⁽³⁾ (1917) 40 All. 216.

⁽⁴⁾ (1916) 41 Bom. 438.

⁽⁵⁾ (1921) 46 Bom. 732.