

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Rao.*

1911.

June 27.

SADASHIV BIN MAHADU DHOLE (ORIGINAL DEFENDANT 1), APPELLANT, *v.* NARAYAN VITHAL MAWAL (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Civil Procedure Code (Act V of 1908), section 47—Limitation Act (IX of 1908), Article 138—Transfer of Property Act (IV of 1882), section 90—Purchase by decree-holder—Suit to recover possession—Execution.*

In execution of a redemption decree the decree-holder (mortgagee) himself purchased the property at the court-sale. After the confirmation of the sale, the legal representative of the decree-holder (mortgagee auction-purchaser) brought a suit to recover possession of the property so purchased. The defendants (representatives of the mortgagors judgment-debtors) contended that the question involved in the suit related to the execution of the decree, therefore, the suit was not maintainable under section 47 of the Civil Procedure Code (Act V of 1908) and that the plaintiff's remedy lay under Order 21, Rule 5. The first Court allowed the claim.

On appeal by one of the defendants,

*Held*, reversing the decree, that,

(1) The suit was barred by section 47 of the Civil Procedure Code (Act V of 1908).

(2) A decree-holder by becoming a purchaser at a court-sale did not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code.

(3) Proceedings for delivery of possession of property purchased by the decree-holder were proceedings in execution of the decree and fell within the scope of section 47 of the Civil Procedure Code.

(4) Article 138 of the Limitation Act (IX of 1908) did not override the provisions of the Civil Procedure Code. They should be read together. Where the auction-purchaser was also a party to the suit in which the decree was passed, his claim for the delivery of possession of the property purchased must be determined by the Court in the execution department. But where the auction-purchaser was a third party, it was open to him to bring a suit for possession of the property purchased by him and such a suit would be governed by twelve years' limitation under Article 138 of the Limitation Act.

(5) Under section 90 of the Transfer of Property Act (IV of 1882) the execution proceedings did not terminate with the sale.

\* First Appeal No. 135 of 1910.

The execution of the decree being barred at the date of the suit, it was not allowed to be treated as a proceeding in execution.

FIRST appeal against the decision of Rattonji Mancherji, First Class Subordinate Judge of Poona, in original Suit No. 213 of 1909.

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The facts were as follows :—

Two undivided brothers, Mahadu and Ganpati, owned an undivided  $\frac{1}{3}$  share in the lands in dispute. They had monetary dealings with the plaintiff's father Vithal Ramchandra Mawal to whom they had passed several mortgage-deeds with respect to their  $\frac{1}{3}$  share. The total amount of the mortgages was Rs. 13,000. On the 28th September 1883 the mortgagors filed a redemption suit, No. 696 of 1883, in the Court of the First Class Subordinate Judge of Poona, and the decree in the suit, which was dated the 14th February 1885, ordered the mortgagors to pay to the mortgagee Rs. 7,905 with interest at 4 per cent. per annum by seven yearly instalments, and in default of payment the amount should be realized by sale of mortgaged property. The said decree was upheld by the High Court in appeal. Default having been committed in the payment of the decretal amount, the decree-holder (mortgagee) applied for the realization of the decretal debt by the sale of the mortgaged property. As the judgment-debtors (mortgagors) were agriculturists, execution was transferred to the Collector and by his order the mortgaged property was sold on the 29th November 1899 and was purchased by the decree-holder himself. The sale was confirmed on the 6th January 1900. Subsequently, the decree-holder having died, his son and legal representative brought the present suit for the recovery of the property purchased by his father at the court-sale and mesne profits at Rs. 150 per year:

Defendant 1, Sadashiv, the son and legal representative of Mahadu, one of the judgment-debtors, contended that the suit was not maintainable inasmuch as the plaintiff's father purchased the property in execution of his own decree, that according to section 47 of the Civil Procedure Code (Act V of 1908) the plaintiff should have taken action in execution of the

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decree and his remedy was, therefore, under Order 21, Rule 25, that the suit could not be treated as an application, the execution of the decree being time-barred, and that he, being a minor, was not properly represented in the execution proceeding.

Defendant 2, Bhiramji Rustomji, a purchaser from defendant 1, set up *inter alia* his title to one of the lands in suit, namely, Pratbandi No. 14.

The Subordinate Judge found that the plaintiff's claim was proved with respect to all the lands in suit except Pratbandi No. 14, that the plaintiff was not bound to seek his remedy in execution proceedings, that the estate of defendant 1 was sufficiently represented in execution proceedings and that the plaintiff was entitled to recover possession of all the lands except Pratbandi No. 14. He, therefore, passed a decree for the plaintiff for the recovery of the lands in suit except Pratbandi No. 14.

With respect to the defendants' contention that the plaintiff should have moved under the proceedings in execution, for the want of any ruling of the Bombay High Court on the point, the Subordinate Judge followed the Full Bench ruling of the Allahabad High Court in *Bhagwati v. Banwari Lal*<sup>(1)</sup> which laid down that "section 244 was not a bar to a suit like the present, and the decree-holder may obtain possession either by an application under sections 318 and 319 of the Code of Civil Procedure or by a separate suit."

Defendant 1 appealed.

*P. D. Bhide* for the appellant (defendant 1):—The plaintiff should have sought his remedy in execution proceedings and not by a separate suit. Although the plaintiff purchased the property at the auction-sale, he does not thereby cease to be a decree-holder and the question of recovering possession of the property so purchased relates to satisfaction and execution of the decree under section 318 of the Civil Procedure Code (Act XIV of 1882): *Manickka Odayan v. Rajagopal Pillai*<sup>(2)</sup>; *Kasinatha*

(1) (1908) All. 82.

(2) (1907) 30 Mad. 507.

*Ayyar v. Uthumansa Rowtham*<sup>(1)</sup>; *Muttia v. Appasami*<sup>(2)</sup>; *Sandhu Taraganar v. Hussain Sahib*<sup>(3)</sup>; *Sheo Narain v. Nur Muhammad*<sup>(4)</sup>; *Ram Narain Sahoo v. Bandi Pershad*<sup>(5)</sup>; *Kallayat Pathumayi v. Raman Menon*<sup>(6)</sup>.

The view taken by the majority of the Allahabad Full Bench in *Bhagwati v. Bānwarī Lal*<sup>(7)</sup> is not in conformity with the view of the same Court in *Sheo Narain v. Nur Muhammad*<sup>(4)</sup> and the opinion of the minority is in accordance with the view of the other High Courts. Their Lordships of the Privy Council have ruled that section 244 of the Civil Procedure Code (Act XIV of 1882) should not receive a narrow construction: *Prosunno Kumar Sanjal v. Kali Das Sanjal*<sup>(8)</sup>.

Section 318 of the Civil Procedure Code (Act XIV of 1882) which relates to the recovery of possession finds its place in the chapter dealing with execution proceedings, and when a cheap remedy is prescribed or special procedure is laid down, it should be adopted in preference to the general and costly one: *Madhusudan Das v. Gobindā Prīa Chowdhurani*<sup>(9)</sup>.

In *Sanwal Das v. Bismillah Begam*<sup>(10)</sup>, *Muttia v. Appasami*<sup>(11)</sup>, *Sariatoolā Molla v. Raj Kumar Roy*<sup>(12)</sup> and *Lakshmanan Okettiar v. Kannammal*<sup>(13)</sup> it was held that an application for delivery of possession is a step in aid of execution. The sale does not become complete and there is no complete satisfaction of the decree until the decree-holder gets possession of the property. The words "resistance to execution" in section 330 of the Code show that the Legislature treated this matter as relating to execution. The object of section 244 is to provide a speedy remedy: *Vīraraghava Ayyangar v. Venkatacharyar*<sup>(14)</sup>; *Muttia v. Appasami*<sup>(11)</sup>. So also an application for recovery of money paid

(1) (1901) 25 Mad. 529.

(2) (1890) 13 Mad. 50.

(3) (1904) 28 Mad. 87.

(4) (1907) 30 All. 72.

(5) (1904) 31 Cal. 737.

(6) (1902) 26 Mad. 740.

(7) (1908) 31 All. 82.

(8) (1892) 19 Cal. 688.

(9) (1899) 27 Cal. 34 at p. 37.

(10) (1897) 19 All. 480.

(11) (1890) 13 Mad. 504.

(12) (1900) 27 Cal. 709.

(13) (1900) 24 Mad. 185.

(14) (1882) 5 Mad. 217.

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into Court on account of the sale is held to be a step in aid of execution: *Bapuchand v. Mugutrao*<sup>(1)</sup>, *Venkatarayalu v. Narasimha*<sup>(2)</sup>.

Article 138 of the Limitation Act cannot control the provisions of the Civil Procedure Code. No doubt the decree does not directly provide for possession, but being a decree, under section 88 of the Transfer of Property Act there is a right of sale, and this circumstance is a process for the satisfaction of the decree. The decree cannot be said to be satisfied until delivery of possession to the auction-purchaser.

The judgment-debtors were not properly represented on the record at the time of the sale. The proper guardian of the judgment-debtors was their mother and notwithstanding that she was living, she was ignored and some other relation of theirs was brought on the record as their guardian. This circumstance vitiates the sale: *Dakeshur Pershad Narain Singh v. Rewat Mehton*<sup>(3)</sup>, *Daji Himat v. Dhirajram Sadaram*<sup>(4)</sup>.

*P. P. Khare* for the respondent (plaintiff) :—There can be no distinction between a decree-holder auction-purchaser and a stranger auction-purchaser. The decree-holder auction-purchaser is no longer a decree-holder and he sues for possession in his capacity as auction-purchaser: *Mahabir Pershad Singh v. Macnaghten*<sup>(5)</sup>, *Bhagwati v. Banwari Lal*<sup>(6)</sup>. In the last Full Bench ruling the Allahabad High Court held that a decree-holder auction-purchaser cannot be said to continue as decree-holder after his purchase and the question as to possession does not relate to execution or satisfaction of the decree. Articles 138 and 180 of the Limitation Act make no distinction between a decree-holder auction-purchaser and a stranger auction-purchaser.

Section 88 of the Transfer of Property Act does not provide for possession being delivered. Hence the decree was satisfied

(1) (1896) 22 Bom. 340.

(2) (1880) 2 Mad. 174.

(3) (1896) 24 Cal. 25.

(4) (1887) 12 Bom. 18.

(5) (1889) 16 Cal. 682.

(6) (1903) 31 All. 82.

immediately after the property was sold and purchased by the decree-holder, and nothing further remained to be done. Section 318 of the Civil Procedure Code is permissive and gives the purchaser an option to proceed in execution or to file a separate suit.

The defendants' family was joint and there was proper representation.

RAO, J.:—The facts of the case are briefly these: The property in dispute was originally mortgaged by defendant 1's father and uncle to plaintiff's father. On 14th February 1885 a decree was passed directing the mortgagors to pay Rs. 7,905-4-3 by seven equal yearly instalments. In default of payment of any instalment at the due date, the mortgaged property was to be sold for the whole sum due. Default having been made in payment of the instalments, the mortgagee put up the property to sale and purchased it himself on 29th November 1899. The sale was confirmed on 6th January 1900.

On 7th April 1909 plaintiff, who is the son and legal representative of the auction-purchaser, filed the present suit for possession of the property purchased in 1899. Defendants resisted the claim on several grounds, but their contentions were overruled and a decree was passed in plaintiff's favour, awarding him possession of the property in suit except one piece of land, Pratbandi No. 14, as to which plaintiff's title was not proved.

Against this decree defendant 1 appeals to this Court.

The main question argued in appeal is whether the suit is barred by section 47 of the Code of Civil Procedure, 1908.

Section 47 provides that all questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to execution, discharge or satisfaction of a decree, shall be determined by the Court executing the decree and not by a separate suit. We have to consider (1) whether the questions involved in the present suit arise between the parties to the suit in which the decree was passed or their representatives, and (2) whether they are questions relating to

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execution of the decree. The judgment-debtors are dead. Defendant 1 is the son of one of the judgment-debtors. Plaintiff is the son and heir of the decree-holder who purchased the property at the court-sale held in execution of his decree. It is contended for the respondent that the decree-holder ceases to be a party to the suit after he purchases the property at the court-sale, and that he is entitled to possession of the property in his character as auction-purchaser, and not as a decree-holder. We are unable to accede to this contention. In *Madhusudan Das v. Gobinda Pria Chowdhurani*<sup>(1)</sup> Macpherson and Stevens, JJ., hold that decree-holder is none the less a party to the suit because he happens to be an auction-purchaser. In *Ram Narain Sahoo v. Bandi Pershad*<sup>(2)</sup> the Court observes, that the fact that the decree-holder is also an auction-purchaser does not make section 244 of Act XIV of 1882 the less applicable to the case. Similarly the Madras High Court observes in *Kasinatha Ayyar v. Uthumansa Rowthan*<sup>(3)</sup>: "It would be impossible to hold that having been a party to the decree, he ceased to be a party because he purchased the property at the sale held in execution". No doubt in *Bhagwati v. Banwari Lal*<sup>(4)</sup> a Full Bench of the Allahabad High Court hold, that although the same person may be the decree-holder and the auction-purchaser, he fills two different capacities, and it is in the latter capacity only that he can apply for and obtain possession. With all respect for the opinion of the majority of the Full Bench of the Allahabad High Court, we agree in the view taken by the Calcutta and Madras High Courts, that a decree-holder by becoming a purchaser at a sale held in execution of his decree does not cease to be a party to the suit within the meaning of section 47 of the Civil Procedure Code.

The next question is, whether the plaintiff's claim for delivery of possession of the property in dispute is a question relating to execution, discharge or satisfaction of a decree within the meaning of section 47 of the Civil Procedure Code. It is contended that the execution proceedings came to an end when

(1) (1899) 27 Cal. 34.

(2) (1904) 31 Cal. 737 at p. 742.\*

(3) (1901) 25 Mad. 529 at p. 532.

(4) (1908) 31 All. 82.

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the property was sold and the sale confirmed. This contention does not appear to us to be sound. We are of opinion that proceedings in execution (so far as the decree-holder is concerned) are not completed until the decree-holder obtains the benefit of the sale held in execution of his decree. In *Bapuchand v. Mugutrao*<sup>(1)</sup> it was held by this Court that an application by a judgment-creditor for payment to him of money which has been paid into Court on his account in execution of his decree, is an application to take a step in aid of execution of the decree. In that case Farran, C. J. observes that when money is paid into Court in satisfaction of a decree, the execution of the decree with regard to such payment is not fully completed till the money has been actually paid by the Court to the judgment-creditor. That is also the view taken by the Madras and Allahabad High Courts. See *Koormayya v. Krishnamma Naidu*<sup>(2)</sup>, *Paran Singh v. Jawahir Singh*<sup>(3)</sup> and *Sujan Singh v. Hira Singh*<sup>(4)</sup>. If then an application made by a decree-holder to be paid the proceeds of a sale held in execution of his decree is a step in aid of execution, we do not see any difference in principle between such an application and an application made by a decree-holder, who is also the auction-purchaser, to be put in possession of that which represents the money which would have been paid into Court, if a third party had purchased the property. We think that the execution of the decree is not complete and final, until in the one case the decree-holder actually receives the sale-proceeds through the Court, and in the other case until he secures possession of the property through the Court. Accordingly it is held that an application by a decree-holder to be put in possession of the property which he has purchased in execution of his decree is a step in aid of execution of that decree. See *Sariatoola Molla v. Raj Kumar Roy*<sup>(5)</sup>; *Lakshmanan Chettiar v. Kannammal*<sup>(6)</sup>; *Kasinatha Ayyar v. Uthumansa Rowthan*<sup>(7)</sup>; *Moti Lal v. Makund Singh*<sup>(8)</sup>. The object of the application for delivery of possession, as observed

(1) (1896) 22 Bom. 340.

(5) (1900) 27 Cal. 709.

(2) (1893) 17 Mad. 163.

(6) (1900) 24 Mad. 185.

(3) (1884) 6 All. 366.

(7) (1901) 25 Mad. 529.

(4) (1889) 12 All. 399.

(8) (1897) 19 All. 477.

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by Maclean, C. J., in *Sariatoolla Molla v. Raj Kumar Roy*<sup>(1)</sup>, "is to complete, by giving possession, the purchase which the applicant has made. It is a step in aid of execution in the sense that it is a step to make that which has been done final and complete, and in this sense to aid the execution which can hardly be said to have been complete."

This being the case, proceedings for delivery of possession to the auction-purchaser are proceedings in execution of a decree, and fall within the scope of section 47 of the Civil Procedure Code. See *Madhusudan Das v. Gobinda Priya Chowdhurani*<sup>(2)</sup>; *Ram Narain Sahoo v. Baudi Pershad*<sup>(3)</sup>; *Kattayat Pathumayi v. Raman Menon*<sup>(4)</sup>; *Kasinatha Ayyar v. Uthumansa Rowthan*<sup>(5)</sup>; *Muttia v. Appasami*<sup>(6)</sup>.

But it is argued by Mr. P. P. Khare for respondents that Article 138 of the Limitation Act allows a suit to be brought by an auction-purchaser to recover possession of the property sold within twelve years from the date of confirmation of the sale. It is true that in Article 138 no distinction is made between a purchaser who is a decree-holder and a purchaser who is not a decree-holder. But Article 138 does not override the provisions of section 47 of the Civil Procedure Code. The two should be read together. Where the auction-purchaser is also a party to the suit in which the decree was passed, his claim for delivery of possession of the property purchased by him must be determined by the Court in the execution department. But where the auction-purchaser is a third party, it is open to him to bring a suit for possession of the property purchased by him, and such a suit will be governed by Article 138 of the Limitation Act.

It is lastly contended, that in the present case the decree in execution of which the property was sold being a decree for sale of the property mortgaged, the mortgagee-decree-holder was entitled under section 88 of the Transfer of Property Act to the sale-proceeds only, and not to possession of the property sold, and that when the sale took place, the execution proceedings

(1) (1900) 27 Cal. 709 at pp. 712, 713.

(4) (1902) 26 Mad. 740.

(2) (1899) 27 Cal. 34.

(5) (1901) 25 Mad. 529.

(3) (1904) 31 Cal. 737 at p. 742.

(6) (1890) 13 Mad. 501.

came to an end. The answer to this contention is that section 90 of the Transfer of Property Act shows that the execution proceedings do not terminate with the sale; if the sale-proceeds are insufficient to pay the mortgage-debt, the decree-holder has to take further steps to recover the balance of the decretal amount.

On all these grounds we hold that the plaintiff's claim for delivery of possession of the property in suit falls within section 47 of the Civil Procedure Code, and that this suit cannot lie. We would have allowed the present suit to be treated as a proceeding in execution, but for the fact that the execution of the decree was barred by limitation at the date of the suit.

Mr. Bhide for the appellant contended that defendant 1 was a minor, that his estate was not properly represented in the execution proceedings in the course of which the land was sold, and that therefore the sale was a nullity. He contends that there was fraud on the part of the decree-holder in representing to the Court that the minor's mother was dead though in reality she was alive, and in getting a distant relation of the minor appointed as a guardian *ad litem*. The lower Court has found that the alleged fraud is not proved, and that the minor's estate was sufficiently represented during the execution proceedings. We see no reason to come to a different conclusion. There is no evidence whatever to prove the alleged fraud.

We set aside the decree of the lower Court and dismiss the suit with costs throughout.

*Decree set aside.*

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