

## APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Hayward.\*

SHIVBAI KOM BABYA SWAMI (ORIGINAL APPLICANT), APPELLANT v.  
YESOO, MOTHER'S NAME CHEOO NAYAKIN (ORIGINAL OPPONENT),  
RESPONDENT.°

1918.

July 23

*Civil Procedure Code (Act V of 1908), sections 47, 144 and 151—Sale in execution of ex parte decree—Decree-holder becoming purchaser—Subsequent setting aside of the ex parte decree and re-trial of the case—Second decree in plaintiff's favour—Application by defendant to set aside sale under the first decree—Sale set aside on defendant paying up the amount due under the second decree—Limitation Act (IX of 1908), Articles 166 and 181.*

In 1906, an *ex parte* decree was passed against the defendant, in execution of which the defendant's house was sold and purchased by the plaintiff decree-holder in 1910. The *ex parte* decree was subsequently set aside; but at the re-trial, a decree was again passed in plaintiff's favour in 1914. In the meanwhile, the defendant applied to have the sale of the house set aside:—

*Held*, that the order setting aside the sale could be passed either under section 47 or section 144 or 151 of the Civil Procedure Code, 1908.

*Held*, also, that the application was not governed by Article 166, but that it was within time under the provisions of Article 181 of the Indian Limitation Act, 1908, the cause of action having accrued upon setting aside the *ex parte* decree in 1914.

*Held*, further, that the previous sale of the house in execution under the previous decree which had been set aside should itself be set aside as being no longer based on any solid foundation; but subject in all the circumstances to the condition that the defendant should pay up the amount due from her under the second decree within a specified time.

SECOND appeal from the decision of M. B. Tyabji, District Judge of Ratnagiri, reversing the order passed by S. A. Naik, Subordinate Judge at Rajapur.

Execution proceedings.

In 1906, the plaintiff obtained an *ex parte* decree against the defendant for Rs. 86. In execution of the

\* Second Appeal No, 115 of 1917.

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decree, a house of the defendant was sold at a Court-sale and purchased by the plaintiff herself in 1910.

Subsequently, the defendant applied to have the *ex parte* decree set aside. The decree was set aside in 1914, and a retrial of the case ordered. At the retrial, the plaintiff again obtained a decree against the defendant for Rs. 87.

In the meanwhile, the defendant applied to the Court to set aside the sale of the house. The first Court was of opinion that the application was not competent under section 47 of the Civil Procedure Code, 1908; the application was, therefore, numbered and registered as a suit. But as the lower appellate Court held that the matters in dispute were to be decided under section 47, the application was proceeded with as such. The first Court held that the sale was liable to be set aside, because the decree in execution of which the sale had taken place was set aside and the purchaser was the decree-holder herself. The sale was consequently set aside.

On appeal, the lower appellate Court reversed the order and dismissed the application on the following grounds:—

“The facts that the sale took place under an *ex parte* decree, that the purchaser happened to be a decree-holder and that the *ex parte* decree was set aside after the sale, are all immaterial. The sale took place under a valid decree, and it is perfectly valid. It has not been impugned on the ground of material irregularity in publishing or conducting it. It has been expressly held that a sale in execution of a decree is not affected by the subsequent reversal of it (7 Bom. L. R. 586), and that a decree is not illegal or invalid because it was obtained *ex parte* (9 Bom. L. R. 1099).”

The defendant appealed to the High Court.

*Nilkanth Atmaram*, for the appellant:—The ruling in *Shivlal Bhagvan v. Shambhuprasad*<sup>(1)</sup> applies to the

<sup>(1)</sup> (1905) 29 Bom. 435.

equities created by reason of the fact that the auction purchaser is a *bona fide* purchaser and a stranger: see also *Nawab Zainul-abdin Khan v. Muhammad Asghar Ali Khan*<sup>(1)</sup>; *Mukhoda Dassi v. Gopal Chunder Dutta*<sup>(2)</sup>; *Set Umedmal v. Srinath Ray*<sup>(3)</sup> and *Paresh Nath Mallick v. Hari Charan Dey*<sup>(4)</sup>.

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*P. B. Shingne*, for the respondent:—No appeal lies to this Court, as the order appealed from does not fall under section 144 of the Civil Procedure Code. The words “varied” and “reversed” in that section refer to variation and reversal of an order in appeal, and do not refer to the setting aside of an order, as has been done in the present case. The decision in *Shivla’s case* has been based on general grounds; and no distinction is to be found therein as regards the position created when the auction-purchaser is the decree-holder himself. Even if the order is treated as falling under section 151 of the Civil Procedure Code no appeal lies.

HAYWARD, J.:—The plaintiff Yesu got an *ex parte* decree for Rs. 86 against the defendant Shivbai in 1906. Shivbai’s house was sold in execution of that decree in 1910, but she succeeded in subsequently getting the *ex parte* decree set aside and in having the case retried. The plaintiff Yesu succeeded in the retrial in obtaining a decree against the defendant, Shivbai for a sum of Rs. 87 in 1914. But Shivbai then applied to have the previous sale of the house in execution set aside. That application was granted by the Court of first instance, but was rejected by the Court of first appeal which appears to have treated the application as one under section 47 of the Civil Procedure Code. Shivbai has accordingly come to get that decision set aside in second appeal.

(1) (1887) L. R. 15 I. A. 12.

(3) (1900) 27 Cal. 810.

(2) (1899) 26 Cal. 734.

(4) (1911) 38 Cal. 622 at p. 627.

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The substantial point argued has been whether in the circumstances stated the previous sale of the house in execution could be set aside, and reliance has been placed for the finding in the negative, upon the case of *Shivlal Bhagvan v. Shambhuprasad* <sup>(1)</sup>. But it has been replied to that argument that that case referred particularly to the equities arising in favour of a third party being a *bona fide* purchaser for value without notice at the Court-sale. It seems to me that there is force in this argument, particularly in view of the remarks of the Privy Council in the case of *Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* <sup>(2)</sup>, in which their Lordships of the Privy Council pointed out at page 172 that "there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order." That distinction has recently been again referred to in the case of *Set Umedmal v. Srinathi Ray* <sup>(3)</sup>. It seems to me, therefore, upon the equities and upon the authorities that the previous sale of the house in execution under the previous decree which had been set aside ought itself to be set aside as being no longer based on any solid foundation.

There was also some argument as to the particular rule under which such an order could be made. It seems to me that the order must be held to be made, as decided without subsequent objection by the first appeal Court, under section 47 of the Civil Procedure Code, and if any further authority for such an order

<sup>(1)</sup> (1905) 29 Bom. 435.

<sup>(2)</sup> (1887) 10 All. 166.

<sup>(3)</sup> (1900) 27 Cal. 810.

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should be required, then it seems to me that a reference could be made either to section 144 or section 151 of the Civil Procedure Code. It has been urged that the former section does not cover a case in which an *ex parte* decree has been set aside. But it seems to me that the words used are sufficiently wide to cover even such a case though the use of the word "varied" or "reversed" and the reference to "the Court of first instance" would appear on first sight to have had primarily in view, proceedings in appeal. But however that may be, the case would, in my opinion, undoubtedly be covered by section 151 of the Civil Procedure Code. There can, in my opinion, be no real doubt in such a case as to there being a second appeal, because the proceedings were, as already stated, under section 47 to which it has merely become necessary by reference to apply the provisions of section 144 or 151 of the Civil Procedure Code.

It was also suggested that the application ought to be regarded as time-barred under Article 166 of the Schedule to the Limitation Act: But that Article appears to be hardly applicable to the facts of this particular case. The cause of action accrued upon setting aside the *ex parte* decree in 1914 and taking that as the date from which limitation ran, the application would clearly be within time under the provisions of Article 181 of the Schedule to the Limitation Act.

We ought, therefore, in my opinion, to set aside the order of the first appeal Court and to direct that the previous sale of the house in execution should be set aside, but subject in all the circumstances to this condition that Shivbai pays up the amount now due from her under the second decree within three months of the decision of this second appeal.

Each party to bear his own costs throughout.

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HEATON, J. :—I have very little to add to the judgment just delivered. I would, however, add this. We have here a case of a wrong which has been done to the applicant, because her property was sold under an *ex parte* decree wrongly obtained. She was ignorant of the decree and even of the sale which thereafter took place under it and therefore was unable within the period allowed by limitation to get the sale set aside by the ordinary application which must be made within one month. And if she is to get it set aside at all, it can only be either by suit or by an application of another kind. It has been decided by the District Court and against this decision there was no appeal, that this application should be treated as one under section 47. We are therefore only concerned with the question whether the Court has the power to set aside the sale. That question my learned Brother has dealt with and I agree to the order proposed.

*Order set aside.*

R. R.

## APPELLATE CIVIL.

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

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July 24.

MORU NARSU GUJAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. HASAN VALAD FATTEKHAN JUMMAL AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), section 47, Order XXI, Rule 2—Decree—Execution—Court-sale—Adjustment, uncertified—Executing Court or a Court hearing suit precluded from recognising the adjustment—Redemption—Fraud—Court-sale not to be set aside after many years on a vague plea of fraud—Transfer of property Act (IV of 1882), section 52.*

In 1884, M passed an unregistered mortgage bond for Rs. 30 in favour of the plaintiff. In 1899 plaintiff obtained a decree on the bond and in execution

\* Second Appeal No. 1051 of 1916.