

APPELLATE CIVIL.

Before Shamshar Bahadur, J.

GURDIAL SINGH,—Appellant

versus

SAWARAN SINGH AND ANOTHER,—Respondents.

Execution Second Appeal No. 1592 of 1963.

*Code of Civil Procedure (Act V of 1908)—S. 47 and Order 21—
Rule 92—Sale of immovable property of the judgment-debtor held in
execution of an ex-parte decree—Judgment-debtor applying for setting
aside ex parte decree and sale—Ex parte decree set aside—Execution
sale—Whether can be confirmed thereafter.*

1964

November, 26th

Held, that the explanation added to section 47 of the Code of Civil Procedure, 1908, by the Code of Civil Procedure (Amendment) Act, 66 of 1956, makes it clear that the auction-purchaser is not a stranger and like the judgment-debtor and the decree-holder is a party to the suit for the purposes of section 47. When an *ex parte* decree, in execution whereof the immovable property of the judgment-debtor is sold by auction, is set aside, the execution sale also falls with it as there can be no sale in execution of a decree which has ceased to exist. The Court has, therefore, no power to confirm the sale after setting aside the *ex parte* decree.

Execution Second Appeal from the judgment of the court of Shri Harish Chander, Senior Sub-Judge, with Enhanced Appellate Powers, Jullundur, dated the 29th November, 1963, affirming that of Shri Amarjit Chopra, Sub-Judge 1st Class, Jullundur, dated 31st August, 1963, confirming the sale of the attached property for Rs. 5,100 in favour of the auction-purchaser and also directing the auction-purchaser to furnish necessary stamp as also to make the necessary deposits.

H. S. WASU, SENIOR ADVOCATE WITH BALBIR SINGH ADVOCATE for the Appellant.

CHUNI LAL, ADVOCATE, for the Respondents.

JUDGMENT

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SHAMSHER BAHADUR, J.—This is an appeal of the judgment-debtor whose objections with regard to the sale of his house for a sum of Rs. 5,100 in favour of the respondent auction-purchaser have been dismissed by the executing Court and also in appeal by the Senior Sub-ordinate Judge, Jullundur.

The facts on which there is no dispute are these. A decree against the appellant Gurdial Singh, for a sum of Rs. 519 was passed *ex parte* on 27th of February, 1961, in favour of Swaran Singh and another. Swaran Singh, decree-holder was not slow in execution of this decree and a warrant for attachment of the judgment-debtor's house was issued on 10th of May, 1961. This house was sold in auction for Rs. 5,100 in favour of Shri Janak Raj, respondent 2, on 16th December, 1961. The judgment-debtor applied on 2nd of January, 1962, for setting aside the *ex parte* decree. He also preferred objections on 20th of January, 1962, making allegations that the house sold for Rs. 5,100 was of the value of Rs. 25,000, the auction was

not preceded by proper publication and did not take place at the proper time, and lastly that an application had been made to set aside the *ex parte* decree in execution of which the sale had taken place. The provision of the Code under which this application was made is not mentioned but it has always been treated as an application under rule 90 of Order 21 of the Code of Civil Procedure. The order staying the confirmation of sale was passed on 19th of April, 1962. Subsequently, the application made on 2nd of January, 1962, was accepted and the *ex parte* decree against the judgment-debtor was set aside on 26th of October, 1962. The auction-purchaser thereafter promptly moved for "revival of the execution file" and prayed in his application of 3rd of November, 1962, to have the sale made on 16th of December, 1961, confirmed under rule 92 of Order 21 of the Code of Civil Procedure. In reply to this application, the judgment-debtor pleaded that the *ex parte* decree having been set aside, the sale which had been made in execution of it became a nullity. The only issue framed by the executing Court is to this effect:—

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"What is the effect of setting aside the *ex parte* decree on the rights of the auction-purchaser?"

The executing Court by its order of 31st of August, 1963, accepted the application of the auction-purchaser for revival of the execution proceedings and by the same order holding that the objections filed by the judgment-debtor under Order 21, rule 90, were barred by time, confirmed the auction sale under the provisions of rule 92 of Order 21. The judgment-debtor, having failed before the lower appellate Court, has come again to this Court in further appeal.

It has been contended by Mr. Wasu, the learned counsel for the appellant, that the auction sale held on 16th of December, 1961, could not have been confirmed by the Court on 31st of August, 1963, at the instance of the auction-purchaser as the *ex parte* decree for the satisfaction of which the sale had taken place had been set aside on 26th of October, 1962. The auction-purchaser was fully alive to this situation and indeed it was after the *ex parte* decree had been set aside that he applied for its confirmation though in the form of "revival of the execution file" on 3rd of November, 1962. Both the Courts below have been influenced by the consideration that once the objections

Gurdial Singh preferred against an auction sale are dismissed under rules 89, 90 or 91 of Order 21, Code of Civil Procedure, the Court
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 and another and, thereupon the sale shall become absolute." The explanation introduced in section 47 of the Code of Civil Procedure that "a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit" for purposes of this section, has been held to be inapplicable to the proceedings for setting aside sales on ground of irregularity in the conduct of auction.

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The case for the appellant is founded on the proposition which is indisputable that there can be no sale in execution of a decree which has ceased to exist. Reference may be made to a Division Bench authority of Sir Francis William Maclean, Chief Justice and Banerjee, J., in *Doyamoyi Dasi v. Sarat Chunder Mojumdar and others* (1), where it was observed by the Chief Justice that "there was no decree existing in the suit, and if there were no decree, it is difficult, to my mind, to see how there could be any sale which could be confirmed when the decree under which it was made had ceased to exist." Banerjee, J., assenting to this view, which does not appear to have been contested, observed thus in his short judgment:—

".....the Court ought not to confirm a sale, when at the time such confirmation is asked for, the decree had ceased to be a subsisting decree. In the present case, the decree, which was an *ex parte* decree, had been set aside by an order . . .".

Section 47 of the Code makes it mandatory that "all questions arising between the parties to the suit in which the decree was passed . . . and relating to the execution, discharge or satisfaction of the decree", shall be determined by the executing Court. The explanation inserted by Act No. 66 of 1956 settles the controversy to which it is no longer necessary to advert, and makes it clear that the auction-purchaser is not a stranger and like the judgment-debtor and the decree-holder is a party to the suit for purposes of this section. The application moved by the appellant judgment-debtor on 20th of January, 1962, has been treated on the footing of objections preferred against

(1) I.L.R. 25, Cal. 175.

the auction sale. It is necessary to emphasise that the application itself does not purport to be made under the provisions of Order 21, rule 90 and indeed in paragraph 4, it is asserted that proceedings had been taken to have the decree set aside and the sale in execution could not, therefore, be binding. The confirmation of the sale which had taken place earlier had been stayed and the auction-purchaser had been content to abide by this order. Subsequently, when the auction-purchaser moved for the revival of the execution proceedings, the Court in a composite order confirmed the sale, simultaneously dismissing the application of the judgment-debtor of 20th of January, 1962, treating it as objections under Order 21, rule 90. All that is said about these objections is that they are dismissed having been filed beyond the statutory period of limitation. Under rule 90, a decree-holder or any person affected by the sale may apply to the Court to set it aside on ground of "a material irregularity or fraud in publishing or conducting it". When such objections are dismissed, the executing Court has automatically to confirm the sale under rule 92. It seems plain to me that the application made by the judgment-debtor on 20th of January, 1962, cannot be regarded as objections under rule 90, as the sale was questioned not on the mere ground of irregularity or fraud in publishing or conducting it, but a challenge was made to the *ex parte* decree on the basis of which sale was held. The question substantially, in my opinion, related one to execution, discharge or satisfaction of the decree and could be determined under the provisions of section 47 and especially so when the auction-purchaser is now to be regarded as a party in the suit. There is no question of the auction-purchaser in this case being a stranger as he had full knowledge of the steps which had been taken by the judgment-debtor to have the *ex parte* decree set aside. The proceedings for confirmation of the sale had been stayed on the motion of the judgment-debtor and to the full knowledge of the auction-purchaser.

Reliance has been placed by the learned counsel for the respondent-auction-purchaser on the Privy Council decision of *Nanhelal and another v. Umrao Singh* (2), where it was held by the Board that the confirmation of sale cannot be declined on the ground that the decree-holder and the judgment-debtor say that the decree has been satisfied

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(2) A.I.R. 1931, P.C., 33.

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out of court. This authority of the Privy Council, in my opinion, does not support the proposition that a sale has to be confirmed even when the decree has ceased to exist. It is true that there are authorities which say that the sale has to be confirmed under rule 92 even where the decree has ceased to subsist. These decisions, however, all relate to a time before the amendment of section 47 which placed an auction-purchaser at par with the judgment-debtor and the decree-holder with regard to determination of questions with regard to nullity of sale—Rules 89 to 92 of Order 21. relate to auction-sales in which the conduct of the auction is challenged and as observed by Tek Chand J., in the Full Bench authority of *Gauri v. Ude and others* (3), the proceedings under section 47 and Order 21, rule 90, are separate from each other though not completely independent of each other. Said Tek Chand, J., at page 156:—

“Under Order 21, rule 90, a sale can be set aside only on the ground of a material irregularity or fraud in publishing or conducting it. It does not cover any objections to the sale on the ground that the property in question was not liable to be sold under Section 60. The word ‘conducting’ has been used with reference to the proceedings of the officer conducting the sale and cannot be construed so widely as to cover objections relating to saleability of property.”

The obligation of the Court to confirm a sale under rule 92, arises only where objections have been dismissed with regard to conduct of sales under rules 89 to 91 and not where the sale is attacked on the ground of nullity. The moment the judgment-debtor in the present case came to know about the sale he filed first an application on 2nd of January, 1962, to have the decree set aside and later on 20th of January, 1962, the consequential sale. The judgment-debtor truly speaking had challenged the validity and not merely the conduct of sale.

It is strongly contended on behalf of the respondent-auction-purchaser that the *bona fide* sale had vested rights in the purchaser without notice and the aid of the basic principle of restitution embodied in section 144 of the Code

could not be invoked in such cases. Reliance is placed on a Division Bench judgment of the Madras High Court (Veeraswami and Ramamurti, JJ.), in *S. Chokalingam Asari v. N. S. Krishna Iyer and others* (4), where it was said that:—

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“When a property is purchased in execution of a decree by the decree-holder purchaser himself, such property will be liable to an obligation or claim for restitution in the event of the decree under execution being reversed or set aside on appeal. But in the case of stranger auction-purchaser, the judgment-debtor is not allowed to obtain restitution of property. If the purchaser were to lose the benefit of his purchase on the contingency of the subsequent reversal of the decree, there will be no inducement to the intending purchasers to buy at execution sale and consequently the property would not fetch its proper price at such sales, and the net result would be that the judgment-debtor would be the ultimate sufferer.”

This authority takes account of the old distinction between a stranger auction-purchaser and the decree-holder auction-purchaser—a distinction which has ceased to exist by the amendment introduced in the explanation to section 47.

I would, therefore, conclude that before the sale was confirmed the decree for the satisfaction of which it was held had been set aside to the knowledge of the auction-purchaser, the confirmation of the sale having remained stayed to his knowledge at least from 19th of April, 1962, onwards. I am also of the view that section 47 of the Code of Civil Procedure is an appropriate provision of law to deal with the dispute which had been fairly raised between the judgment-debtor and the auction-purchaser. The executing Court was not bound, therefore, to confirm the sale under rule 92 of Order 21, Code of Civil Procedure. The *ex parte* decree having been set aside, no execution sale could have taken place for its satisfaction.

The appeal, therefore, must be allowed and the sale in favour of the auction-purchaser set aside. In the circumstances, I would make no order as to costs.

(4) A.I.R. 1964, Madras, 404.