

under section 325, Indian Penal Code, alone can on the existing record be safely imputed to Piare accused. There is, however, hardly any evidence implicating the other accused by constructively imputing to them the required intention.

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others
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For the reasons given above, the appeal as against Brahma is dismissed, but as against Piare it is allowed and setting aside his acquittal he is sentenced to three years' rigorous imprisonment under section 325, Indian Penal Code.

MEHAR SINGH, J.—I agree.

Mehar Singh, J.

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APPELLATE CIVIL

Before Mahajan, J.

BALWANT RAI KUMAR,—*Judgment-debtor-appellant.*

versus

AMRIT KAUR,—*Decree-holder-respondent.*

Execution Second Appeal No. 276 of 1959.

Code of Civil Procedure (Act V of 1908)—Section 47—Application to set aside the sale after confirmation—Whether maintainable.

Held, that on the plain reading of section 47 of the Code of Civil Procedure it is clear that the question, whether the sale should or should not be set aside, is one relating to the execution, discharge and satisfaction of the decree, and as it is between the parties to the suit it can only be decided by the executing Court. If the sale is set aside on either of the grounds alleged, it is set aside because it is treated as a nullity and as such has no existence in the eyes of law. In this situation it cannot be said that in fact there was any sale which could be confirmed or that the decree is fully satisfied as a result of such a sale. An application

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to set aside a sale on the ground that it is a nullity is maintainable under section 47 of the Code of Civil Procedure. If, however, the court comes to the conclusion that the sale is not a nullity; it should dismiss the application on the short ground that the same is not maintainable after confirmation in view of the provisions of section 47 of the Code.

Second appeal from the order of Shri P. N. Thukral, Senior Subordinate Judge with enhanced appellate powers, Amritsar, dated the 30th day of December, 1957; affirming that of Shri M. R. Sikka; Sub-Judge, Ist Class, Amritsar; dated the 13th July, 1957, dismissing the Objection application under Section 47 of the Code of Civil Procedure.

RAJINDER SACHAR, for Appellant.

RUP CHAND, for Respondent.

JUDGMENT

Mahajan, J.

MAHAJAN, J.—In execution of a decree obtained by Amrit Kaur against Balwant Rai Kumar, land belonging to Balwant Rai Kumar was sold by auction. The land was purchased by the decree-holder on the 14th June, 1956. This sale was confirmed on the 21st July, 1956, and a sale certificate was granted on the 11th October, 1956. The decree-holder obtained possession on the 21st February, 1957.

On the 27th November, 1956, an application was made by the judgment-debtor under section 47 of the Code of Civil Procedure for setting aside the sale. The principal grounds are that the sale is vitiated as fraud was practised by the decree-holder on the executing Court and that no notice under Order 21 rule 66(2) of the Code was issued to the judgment-debtor and he was totally kept in the dark so far as the sale in dispute is concerned. It is claimed that the sale is a nullity and confers no title on the decree-holder.

This application was opposed by the decreeholder on a number of grounds. It is not necessary to set down all of them. The ground which prevailed with the Courts below related to the maintainability of the objection petition under section 47 of the Code of Civil Procedure for setting aside the sale. The only issue framed is in these terms :—

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“Whether the objection petition under section 47 is maintainable ?”

The executing Court held that after the confirmation of the sale a petition under section 47 of the Code to set aside the same is not maintainable and accordingly it dismissed the petition. An appeal was preferred against this decision to the Senior Sub-Judge, Amritsar, who, by his judgment dated the 30th December, 1957, affirmed the decision of the trial Court. The present appeal is directed against the decision of the learned District Judge.

The contention raised by Mr. Rajindar Sachar, the learned counsel who appears for Mr. Bhagirath Das, is that the Courts below are in error in holding that the application by the judgment-debtor to set aside the sale after its confirmation is not maintainable under section 47 of the Code. The contention of the learned counsel is that as the sale was confirmed after practising fraud on the executing Court, it is a nullity, and once it is set aside the parties would be relegated to the same position which they occupied before the sale. He further contends that as no notice of the sale as required by Order XXI, rule 66(2) of the Code was served on his client the sale is a nullity. For this he relies on the decision of the Bombay High Court reported as *Dada Narayan*

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Thakre v. Jaichand Nagorao Fultambkar and another (1).

After hearing the learned counsel for the appellant I am of the view that there is substance in his contention. Section 47 of the Code is in these terms—

- “(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
- (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

(*Explanation.*—For the purposes of this section, 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).”

On the plain reading of the section it is clear that the question, whether the sale should or should not be set aside, is one relating to the execution,

(1) I.L.R. 1958 Bom. 633

discharge and satisfaction of the decree, and as it is between the parties to the suit it can only be decided by the executing Court. If the sale is set aside on either of the grounds alleged, it is set aside because it is treated as a nullity and as such has no existence in the eyes of law. In this situation it cannot be said that in fact there was any sale which could be confirmed or that the decree is fully satisfied as a result of such a sale. It has been held in a number of decisions of the various High Court that an application to set aside a sale on the ground that it is a nullity is maintainable under section 47 of the Code. In this connection, in addition to the decision of the Bombay High Court referred to above, reference may be made to—

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- (1) *Ashutosh Sikdar v. Behari Lal Kirtania* (1);
- (2) *Baleshwar Chaubey v. Ram Ranavijaya* (2);
- (3) *Phoolchand v. Badri Prasad* (3);
- (4) *Siri Bhan v. Jit Singh* (4).

Mr. Roop Chand, learned counsel for the respondent, has drawn my attention to a Full Bench decision of the Lahore High Court, reported as *Gauri v. Ude* (5). This decision has no application to the facts of the present case. In the Full Bench case the judgment-debtor had notice of the sale and the objections to sale were those which were open to him before the confirmation of the sale, and it was rightly held that those objections were not entertainable under section 47 of the

(1) I.L.R. 35 Cal. 61
(2) A.I.R. 1947 Patna 461 (F.B.)
(3) A.I.R. 1953 Raj. 51 (F.B.)
(4) A.I.R. 1956 Pepsu 77
(5) A.I.R. 1942 Lah. 153

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Code. The other decisions relied upon by Mr. Roop Chand are *Nusrat Ali v. Sakina Begam* (1), *Firm Wasti Ram v. Mt. Ganeshi* (2), and *Sohan Singh and another v. Shamsher Singh and others* (3). In *Nusrat Ali v. Sakina Begam* (1), an objection was preferred by the wife of the judgment-debtor on the ground that the judgment-debtor was away from the country. The objections were rejected on the ground that she had no *locus standi* to raise them. The other observations in this decision are, in the circumstances, merely in the nature of an *obiter dictum*. In *Firm Wasti Ram v. Mt. Ganeshi* (2), an objection was open to the judgment-debtor before the confirmation of the sale and all that was held was that that objection could not be raised after the confirmation of the sale. In *Sohan Singh and another v. Shamsher Singh and others* (3), Mr. Justice Kapur, as he then was, was dealing with a case of a decree for possession. The decree-holder had obtained possession of the land and the decree was consigned to the record room as fully satisfied. Later on, the decree-holder lost possession of part of the property and applied for restoration of that possession and in these circumstances it was held that as the decree had been fully satisfied it could not be revived and that the application under section 47 was not maintainable. As I have already indicated none of these decisions is applicable and the matter seems to be settled by the decisions of the Calcutta, Bombay, Patna and other High Courts referred to in the earlier part of this judgment. No decision to the contrary has been cited by the learned counsel for the respondent.

(1) A.I.R. 1919 Lah. 16

(2) A.I.R. 1939 Lah, 405

(3) 1950 P.L.R. 345

In view of the aforesaid discussion, the present appeal succeeds and is allowed. The decisions of the Courts, below are set aside and the case is remanded to the executing Court for a fresh decision according to law. I may indicate that in case the Court comes to the conclusion that the sale is not a nullity it should dismiss the application on the short ground that the same is not maintainable after confirmation in view of the provisions of section 47 of the Code. The Court will also go into the question whether the application under section 47 is within limitation. The decree-holder will be entitled to get the costs of these proceedings from the judgment-debtor in the event of his succeeding. In case he fails, the parties will bear their own costs throughout of the proceedings up to today. If the judgment-debtor succeeds in establishing that the sale is a nullity, it will be set aside, otherwise, as I have already said, the sale will stand. The parties are directed to appear before the trial Court on the 6th October, 1959.

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Mahajan, J.

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CIVIL MISCELLANEOUS

Before Bhandari, C.J. and Falshaw, J.

PARMESHWARI DASS WADHERA,—*Petitioner.*

versus

THE COMMISSIONER OF INCOME-TAX,—*Respondent.*

Civil Reference No. 9 of 1953.

Indian Income-tax Act (XI of 1922)—Section 66(1)—Adventure in the nature of trade—Factors to determine—Tribunal holding an enterprise to be an adventure in the nature of trade—High Court—Whether will interfere with the finding.

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