

HARNANDRAI BADRIDAS

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v.

DEBIDUTT BHAGWATI PRASAD & ORS.

May 4, 1973.

[A. N. GROVER, K. K. MATHEW AND A. K. MUKHERJEA, JJ.]

Code of Civil Procedure—Order XXI Rule 95 to 102—Whether after an auction sale in execution of a decree, a decree-holder auction-purchaser can move the executing Court for delivery of vacant possession of an immovable property.

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In May 1956, One D obtained a money decree against H. In January 1958, T was appointed Receiver in an insolvency proceeding against one G, a partner of the defendant firm in respect of premises No. 99 and 128 Cotton Street, Calcutta for the purpose of selling those properties. On April 3, 1958, Mr T was also appointed receiver in execution of the decree obtained by D for the sale of the two premises. The properties were put up for sale by auction and K was declared the purchaser of premises No. 128, Cotton Street. K made a deposit of earnest money. There were various proceedings thereafter but on May 19, 1964, the receiver was directed to complete the sale within one month and K was directed to pay the balance of the purchase money. The Receiver was directed to execute and register a conveyance on behalf of the judgment-debtors in case of refusal. On June 17, 1964, the Receiver executed the conveyance on behalf of the judgment-debtor and the insolvent. In due course, the Court made an order to deliver up vacant possession to the auction-purchaser and on appeal, the appellate Court confirmed the original order.

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The main contention of the appellant was that as soon as a receiver in execution has executed a conveyance in favour of an auction purchaser, the decree stands satisfied and there is an end of the execution proceedings. For delivery of vacant possession of the immovable property he has to file a separate suit to get that possession.

Dismissing the appeal and agreeing with the decision of the Calcutta High Court in *Kailash Chandra Tarafdar v. Gopal Chandra Poddar*, I.L.R. 53 Calcutta 781,

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HELD : (i) If a confirmation of the sale would finally terminate all questions as to the execution of the decree, it is difficult to appreciate why the legislature would frame such rules as rules 95 to 102 under order XXI of the Code of Civil Procedure. The legislature must have thought that the duty of the executing court should not end with the confirmation of the Sale as it is because the legislature thought "that the auction purchaser should have the right of applying for possession under the provisions of r. 95 and r. 96 that proceedings for obtaining possession were included in the catena of rules relating to the execution of the decree". [213G]

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(ii) Sec. 47 of the Code of Civil Procedure should be construed liberally. If such a construction is put it is difficult to understand why a decree holder who has been a party to the decree will shed his character as such party merely upon purchasing the property at the execution sale. After all, a decree holder purchases the property in execution of his decree with the permission of the Court. There is no reason why he should not retain his character of a party to the suit until the delivery of possession to him of the property purchased by him. Having regard to the consideration, if any question is raised by the judgment-debtor at the time of delivery of possession concerning the nature of the rights purchased and if the judgment-debtor offers any resistance to delivery of possession the question must be one which in our view relates to the execution, discharge and satisfaction of the decree and arises between the parties to the suit. [213 H]

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Kailash Chandra Tarafdar v. Gopal Chandra Podder I.L.R. 53 Calcutta 781 referred to and *Ram Singh Gopal Singh and others v. Abdullah Habilullah* I.L.R. 26 Lah. 252 over ruled.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1323 of 1967.

Appeal by certificate from the judgment and order dated April 29, 1966 of the Calcutta High Court in Appeal No. 109 of 1965.

S. C. Manchanda and V. Maya Krishnan, for the appellant.

B *B. P. Maheshwari and Suresh Seth*, for Respondent No. 1.

Sharad Manohar and B. P. Maheshwari, for Respondent No. 3.

The Judgment of the Court was delivered by

MUKHERJEA, J.—This appeal by certificate from a judgment of the Calcutta High Court raises an important question as to whether after an auction sale in execution of a decree a decree-holder auction-purchaser can move the executing court for delivery of vacant possession of an immovable property or whether he has to file a separate suit to get that possession. The short facts of the case are as follows. In May 1956 one Debidutt Bhagwati Prasad obtained a money decree against Harnandrai Badridas. In January 1959 Mr. S. Tibrewal, a member of the Calcutta Bar was appointed Receiver in an insolvency proceeding against one Durga Prasad Goinka, a partner of the defendant firm in respect of premises No. 99 and 128 Cotton Street, Calcutta for the purpose of selling those properties. On 3 April 1958 Mr. Tibrewal was also appointed receiver in execution of the decree obtained by Debidutt Bhagwati Prasad for the sale of the two premises. On 26 April 1958 the properties were put up to sale by auction and one Kanta Prosad Chotaria was declared the purchaser of premises No. 128, Cotton Street for Rs. 52,000/-. Kanta Prosad made a deposit of Rs. 13,000/- as earnest money. There were, it appears, various proceedings after this at the end of which, on 19 May 1964, there was an order directing the receiver to complete the sale within one month from that date and Kanta Prosad was directed to pay the balance of the purchase money within that time. The receiver was directed to execute and register a conveyance on behalf of the judgment-debtors who were the owners of premises No. 128, Cotton Street in case they refused to register the same. The purchaser was by the same order directed to pay interest on the balance of the purchase money from 13 June 1963 to 19 March 1964 in default whereof there was an order not to execute the conveyance. On 17 June 1964 the receiver executed the conveyance on behalf of the judgment-debtor and the insolvent. On 19 June 1964 the purchaser through his attorney requested the receiver to make over possession of premises No. 128, Cotton Street. On 23 July 1964 the receiver was further requested by the attorney to make over possession of the premises by the issue of letters of attornment addressed to each tenant in respect of portions which were tenanted and to make over vacant possession of that portion of the premises which was in the occupation of the judgment-debtor to the purchaser. On 17th November 1964 an application was made praying *inter alia* for an order upon the judgment-debtor to deliver vacant possession of the premises in their occupation to the receiver and also a direction to the receiver to deliver vacant possession of the same to the purchaser. In due course, the court made an order in terms of

that prayer. On appeal against that order in the appellate court the original order was confirmed. Hence this present appeal. A

The main contention of the appellant before the appellate court as well as before us is that as soon as a receiver in execution has executed a conveyance in favour of an auction purchaser the decree stands satisfied and there is an end of the execution proceedings so that the question of the auction-purchaser getting possession of the property is a matter which has nothing to do with the execution, discharge or satisfaction of the decree. Such a question does not fall to be determined by the executing court but can be decided only in a separate suit. The question that has been raised by the appellant is one which has formed the subject matter of a long series of decisions which unfortunately have followed two divergent streams: There is on the one hand a full bench decision of the Calcutta High Court in *Kailash Chandra Tarafdar v. Gopal Chandra Poaddar*⁽¹⁾ followed by the Madras High Court while on the other hand there is the decision of the Lahore High Court in *Ram Singh Gopal Singh and Anr. v. Abdullah Habibullah*⁽²⁾ which has been followed in various full bench decisions by the Allahabad High Court and also by the Patna High Court and the Bombay High Court. In the present case, the Calcutta High Court has followed, as indeed they were bound to follow, the full bench decision in *Kailash Chandra Tarafdar's case*⁽¹⁾. G. K. Mitter J. who delivered the judgment of the appellate court after referring to the various conflicting decisions of different High Courts in India on this question makes the following observation : B

"It is somewhat surprising that in spite of great divergence of opinion among the different High Courts the matter has not reached the Supreme Court as yet and one can only hope that it will do so at an early date so that the question can be resolved once for all." C

In *Kailash Chandra Tarafdar's case*⁽¹⁾ the auction-purchaser who was also the decree-holder has made an application for delivery of possession under o.XXI r.95 of the Code of Civil Procedure. The executing court held that he was only entitled to possession under r. 96 that is, through a tenant in possession. Upon an appeal by the decree-holder auction-purchaser the appeal was resisted mainly on the contention that no appeal lay. The lower appellate court allowed the appeal and ordered the auction-purchaser to be put into *khas* possession under r. 95. Upon appeal by the judgment-debtor to the High Court, the principal contention of the judgment-debtor was that no appeal lay to the District Court. The Division Bench who heard the appeal referred the case to the Full Bench on account of certain conflicting decisions in the High Court of Calcutta. While making the order of reference the Division Bench held that no appeal lay before the District Court because the matter did not come within r. 97 on two grounds, namely (i) because it was not a question arising between the parties to the suit and (ii) it was not a matter relating to the execution, discharge or satisfaction of the decree. Chatterjee, Acting C.J. delivering the judgment on behalf of himself and four other learned D

(1) I.L.R. 53 Cal. 781.

(2) I.L.R. 26 Lah. 252.

- A Judges answered the question as to whether a decree-holder auction purchaser is a party to the suit, in the affirmative. Relying among others on the observation of the Judicial Committee in the case of *Prosser v. Coomaraswamy* (1) the learned Acting Chief Justice put a wide and liberal construction on sec. 47 of the Code of Civil Procedure and decided that the decree-holder was undoubtedly a party to the suit and did not lose that status after the sale. As for the second question, his Lordship held that the weight of authority was in favour of the view that where an auction-purchaser is the decree-holder any question relating to delivery of possession is a question relating to the "execution, discharge or satisfaction of the decree" within the meaning of sec. 47.

- C In *Ram Singh Gopal Singh & Anr. v. Abdullah Habibullah* (2) the Lahore High Court came to an entirely contrary decision. According to the Lahore High Court, sec. 47 of the Code of Civil Procedure does not apply to an order passed on an application under o. XXI r. 95 by an auction-purchaser who was also the decree-holder. This view which is supported by a stream of decisions of the High Courts of Allahabad, Patna, Bombay and Rangoon makes no distinction between a decree-holder purchaser and a stranger purchaser. In the case of a D decree-holder purchaser it is, according to this view, a mere accident that the purchaser was also a party before the auction sale and that advantageous factor should not therefore have the effect of making his position better or worse than that of a purchaser who had been a stranger in the suit. Further, according to this view, as soon as a judgment debtor's property is sold in auction and the decretal amount realised by the decree-holder, the decree stands satisfied and after that E stage there can be no scope for any question arising as to the execution, discharge or satisfaction of the decree. The question whether the auction purchaser gets possession of the property is a matter which has nothing to do with the question of satisfaction of the decree.

- As we have already said, the appellant relied on the Full Bench decision of the Lahore High Court. We have carefully gone through the various decisions cited before us and we find ourselves in agreement with the opinion of the full bench of the Calcutta High Court in *Kailash Tarafdar's* case (3). If a confirmation of the sale would finally terminate all questions as to execution of the decree it is difficult to appreciate why the legislature would frame such rules as rules 95 to 102 under o. XXI of the Code of Civil Procedure. We are in respectful agreement with G. K. Mitter J., that the legislature must have thought that the duty of the executing court should not end with the confirmation of the sale and it is because the legislature thought "that the auction purchaser should have the right of applying for possession under the provisions of r. 95 and r. 96 that proceedings for obtaining possession were included in the catena of rules relating to the execution of the decree".

- G H. Sec. 47 in our view should be construed liberally. As far back as in 1892 (4), the Privy Council spoke strongly in favour of putting a

(1) 19 I.A. 166.

(2) I.L.R. 26 Lah. 252.

(3) I.L.R. 53 Cal. 781.

(4) 19 I.A. 166.

liberal construction on sec. 244 of the Code of Civil Procedure of 1882 which corresponded to present sec. 47 of the Code of 1908. The Privy Council reiterated this in *Ganapathy v. Krishnamachariar*⁽¹⁾. If a liberal construction be put upon sec. 47 it is difficult to understand why a decree-holder who has been a party to the decree will shed his character as such party merely upon purchasing the property at the execution sale. After all, a decree-holder purchases the property in execution of his decree with the permission of the court. There is no reason why he should not retain his character of a party to the suit until the delivery of possession to him of the property purchased by him. Having regard to this consideration, if any question is raised by the judgment-debtor at the time of delivery of possession concerning the nature of the rights purchased and if the judgment debtor offers any resistance to delivery of possession the question must be one which in our view relates to the execution, discharge and satisfaction of the decree and arises between the parties to the suit.

Speaking of the two conflicting views on this section the learned commentator of the 13th Edition of Sir Dinshaw Mulla's Code of Civil Procedure makes the following observation :

"The cases in which it has been held that an auction purchaser even if he is the decree-holder is not a party to the suit, require reconsideration in view of the ruling of the Judicial Committee that such an auction purchaser is a party to the suit."

The decision of the Judicial Committee which the learned commentator had in mind is that of *Ganapathy v. Krishnamachariar*⁽¹⁾.

It is important to remember that after the decision of the Privy Council in *Ganapathy's* case there has been an amendment of sec. 47 as a result of which the purchaser at a sale in execution of a decree, whether he is the decree-holder or not, is unquestionably a party to the suit for the purpose of sec. 47. Having regard to this, all questions arising between the auction purchaser and the judgment-debtor must in our view be determined by the executing court and not by a separate suit.

In view of the foregoing considerations we have no hesitation in upholding the view taken by the Calcutta High Court. In the circumstances we dismiss the appeal with costs.

S.C.

Appeal dismissed.

(1) 45 I. A. 54.