

(1965) 12 AHC CK 0019

Allahabad High Court

Case No: Supreme Court Appeal No. 64 of 1964 in F.A.F.O. No. 264 of 1960

Nidhpal Sharma and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: Dec. 21, 1965**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 94, Order 21 Rule 97
- Constitution of India, 1950 - Article 133, 133(1), 136

Citation: AIR 1966 All 360**Hon'ble Judges:** D.S. Mathur, J; D.P. Uniyal, J; B. Dayal, J**Bench:** Full Bench**Advocate:** S.B.L. Gaur, for the Appellant; Shambhu Pd. and V.K. Burman and R.L. Gulati, S.C.C., for the Respondent**Final Decision:** Dismissed

Judgement

Mathur, J.

This application under Article 133 of the Constitution of India by Nidhpal Sharma and two others, auction-purchasers, for a certificate to appeal to the Supreme Court has been referred to the Full Bench to resolve the conflict between two earlier decisions of this Court, namely, the unreported decision in Lala Devi Charan v. Smt. Duloo, Supreme Court Appeal No. 111 of 1958, dated 7-11-1958 (All) and [Janki Prasad and Others Vs. Kailash and Another](#), .

2. The facts of the case material for the decision of the present application are that in suit No. 404 of 1952 the Union of India obtained a decree against Messrs. Palson Soap Mills and Company through Vishwapal Sharma for Rupees Two Lacs and odd from the Court of the Subordinate Judge First Class, Delhi, and the execution thereof was transferred to the Court of the Civil Judge, Mathura where many houses belonging to the judgment-debtor were attached and eventually auctioned. They

were purchased by the present applicants for a paltry sum of a few hundred rupees. The applicants are near relations of the Judgment-debtor, Vishwapal Sharma. Applicants Nos. 1 and 2 are his sons, while applicant No. 3 is the widow of his predeceased son.

3. The Union of India applied to the Civil Judge, Mathura under Order XXI, Rule 90, C. P. C. to set aside the sale on the ground of material irregularity in publishing and conducting the sale, but the application was dismissed and the sale was confirmed. The Union of India preferred an appeal against this order and the High Court allowed the appeal and has set aside the sale under order dated 13-1-1964, The applicants desire to challenge this order before the Supreme Court, and consequently moved the present application under Article 138 of the Constitution of India, which was listed before a Division Bench of this Court and has now been referred to this Full Bench.

4. The final order passed in the two cases, Supreme Court Appeal No. 111 of 1958 (All) and [Janki Prasad and Others Vs. Kailash and Another](#), is in conflict, but no contrary finding on any point has been recorded in either. In fact, the points raised in the two cases were different. In [Janki Prasad and Others Vs. Kailash and Another](#), the only point in issue was the valuation for purposes of Article 133 of the Constitution of India. No one had pleaded that the order setting aside the sale did not amount to a "final order" and it not being a judgment or decree, no appeal lay to the Supreme Court. This question was, however, raised and decided in Supreme Court Appeal No. 111 of 1958 (All). Considering that the whole case has been referred to us for decision, it is but proper that we should, on consideration of the provisions of the Constitution and the case law, decide all the material questions involved.

5. The material part of Article 133(1) of the Constitution of India runs as below:

"An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies-

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court.

It is not in dispute that the value of the property auctioned and purchased by the applicants exceeds twenty thousand rupees. Consequently, the applicants can appeal, as a matter of right, to the Supreme Court, if the High Court's order dated 13-1-1964, sought to be challenged before the Supreme Court, is or amounts to a

"judgment, decree or final order in a civil proceeding".

6. An application under Order XXI, Rule 90, C. P. C. is made during the execution proceeding, and it does not relate to the matters in controversy in the suit; hence the order passed on such an application does not amount to a "decree" as defined in Section 2(2), C. P. C. The term "judgment" is defined in Section 2(9), C. P. C. to mean the statement given by the Judge of the grounds of a decree or order; but because Article 133 makes a distinction between judgment and final order, judgment cannot include an order. In other words, an order passed on the application under Order XXI, Rule 90, C. P. C., whether by the executing court or in appeal, is not a judgment or decree. It is an order and an appeal shall lie to the Supreme Court only if the order amounts to a "final order in a civil proceeding."

7. Two matters for consideration in determining whether the applicants are entitled to the certificate under Article 133(1) of the Constitution of India are: firstly, whether the "civil proceeding" contemplated by Article 133(1) is the proceeding initiated on an application made in execution of the decree or the proceeding based on an application under Order XXI, Rule 90, C. P. C. to have the sale set aside; and secondly, whether the order setting aside the sale under Order XXI, Rule 90, C. P. C. amounts to a "final order".

8. Our attention was drawn to three reported decisions of the Supreme Court, namely, [Mohanlal Goenka Vs. Benoy Krishna Mukherjee and Others](#), ; [Bharat Fire and General Insurance Co. Ltd. New Delhi Vs. The Commissioner of Income Tax, New Delhi](#), and [Smt. Laxmi Devi Vs. Sethani Mukand Kanwar and Others](#), , wherein the High Court had granted the certificate under Article 133(1) of the Constitution of India and the grant of the certificate was not challenged before the Supreme Court. The learned Advocate for the applicants-auction purchasers has naturally relied upon these cases in support of his contention that an order setting aside the sale under Order XXI, Rule 90, C. P. C. amounts to a "final order in a civil proceeding" giving a right to the auction purchaser to prefer an appeal before the Supreme Court. In case the grant of the certificate under Article 133(1) had been challenged before the Supreme Court, these cases could be utilized in favour of the grant of a certificate under Article 133(1); but the possibility of the opposite party not intentionally challenging the grant of the certificate cannot be excluded. Where the High Court has granted the Certificate under Article 133 wrongly, the Supreme Court, though setting aside the certificate already granted, can hear the appeal after granting special leave to appeal. It is for this reason that the grant of a certificate is usually not challenged before the Supreme Court.

9. In this connection it shall be but proper to make a reference to a Privy Council decision where an appeal against the order setting aside the sale under Order XXI, Rule 90, C. P. C. was heard after the grant of special leave and the order of the High Court refusing to grant the necessary certificate had not been challenged. This is the case of AIR 1931 33 (Privy Council) From the case of *Rahimbhoy Habibhoy v. Turner*

(1891) 18 Ind App 6 (PC) it would be evident that the order of the High Court refusing to grant the certificate could be challenged before the Privy Council and, I may say, now before the Supreme Court.

10. Had the learned Advocate for the applicants produced before us a copy of the High Court's order granting the certificate under Article 133(1), we would have considered the grounds which appealed to the Hon"ble Judges while granting the requisite certificate. We have thus no option except to decide the case on the basis of such decisions as have been reported and brought to our notice by the learned advocates for the parties.

11. In *Krishna Prasad Singh v. Moti Chand* (1913) 11 All LJ 517 (PC) the Order of the High Court in appeal whereby the application u/s 311 of the Code of Civil Procedure, 1882, corresponding to Order XXI, Rule 90 of the present C. P. C., was dismissed and the auction sale confirmed, was challenged before the Privy Council, and the respondent raised an objection to the maintainability of the appeal on the ground that in view of Section 591 of the Code an order passed in appeal setting aside or refusing to set aside the sale of an immovable property was not appealable and therefore no appeal lay to the King in Council under Chapter XLV. While repelling this contention their Lordships observed:

"Moreover no reason can be given why orders of so important a character as those made under Sections 311 and 312, which deal finally with the rights of parties, should be excluded from the privilege of an appeal."

The point in issue was not whether every order passed under Sections 311 and 312 of the Code of 1882 was appealable to the King in Council; but whether under the circumstances of that case, or in the event of the order finally determining the rights of the parties, such an order of the High Court could be appealed against before the Privy Council. An order confirming the sale divests the judgment-debtor of his title to the property, and hence is a final decision affecting his rights and as such is a "final order", which could be the subject of appeal before the Privy Council. But the other orders which can possibly be passed by the High Court, in exercise of the appellate or revisional jurisdiction on an application under Order XXI, Rule 90, C. P. C. need not have the same effect. In other words, the above observations cannot be interpreted to mean that every order passed by the High Court on such an application is a "final order" within the meaning of Article 133(1) of the Constitution.

12. Whether the "civil proceeding" means, in the instant case, the execution proceeding initiated on the application of the decree-holder for execution of the decree by attachment and sale of the property, or the proceeding based on the application under Order XXI, Rule 90, C. P. C. for setting aside the sale, has no direct effect on the finding to be recorded on the second question, namely, whether the order setting aside the sale amounts to a final order within the meaning of Article 133; but a consideration of this question is necessary to resolve the conflict between

[Janki Prasad and Others Vs. Kailash and Another,](#) and [Firm Mohammad Sana Ullah and Sons Vs. Firm Haji Rahim Bux and Sons,](#) it being a question which can, at occasions have some importance.

13. Order XXI, C. P. C. bears the heading of "Execution of Decrees and Orders" An application for execution of the decree under Order XXI, Rule 10, C. P. C. is made to the Court which passed the decree or to the Court to which such decree has been sent for execution. The steps to be taken by the decree-holder are contained in the subsequent rules. These rules also make a provision for an application which the decree-holder, judgment-debtor or any person interested can make to have the sale set aside. After the sale of an immovable property the sale can be set aside under Order XXI, Rule 89, C. P. C. at the instance of a person owning or holding an interest in such property; under Order XXI, Rule 90, C. P. C. at the instance of the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale; and under Order XXI, Rule 91, C. P. C. at the instance of the auction-purchaser. On the setting aside of the sale, the property is re-auctioned. The application under Rules 89, 90 or 91 or Order XXI, C. P. C. is thus a part of the execution proceeding and a part thereof cannot rightly be treated as a proceeding by itself.

14. A similar inference can be drawn on consideration of the other provisions of Order XXI, C. P. C. If the decree is for possession of immovable property and any person causes resistance or obstruction in the delivery of possession, the decree-holder can, under Order XXI, Rule 97, C. P. C., make an application to the Court complaining of such resistance or obstruction. If the resistance or obstruction is caused by a person laying a claim in good faith to be in possession of the property on his own account, or on account of some person other than the judgment-debtor, the application under Order XXI, Rule 97, C. P. C. is dismissed and the possession cannot be delivered till the decree-holder obtains a decree against the claimant also; but if the Court is not so satisfied, the decree for possession can be executed after dispossession of such a claimant. Such an application is evidently a step to obtain possession, and hence in execution of the decree, and cannot, by itself, be treated as a distinct civil proceeding. Similarly, after the confirmation of the sale, possession is delivered to the purchaser in case the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequent to the attachment of such property (vide Order XXI, Rule 95, C. P. C.). If there is any resistance or obstruction in obtaining possession, the matter can be complained of by the auction-purchaser by making an application under Order XXI, Rule 97, C. P. C. Such an application is apparently in continuation of the sale and hence a part of the execution proceeding. In this view of the matter, the main proceeding is the execution proceeding and all the applications made under and by virtue of the provisions of Order XXI C. P. C. are a part of the proceeding. Consequently, for purposes of Article 133, the "civil proceeding" is the execution proceeding, and not a

proceeding based on an application made during the execution of the decree.

15. A similar view was expressed in [Firm Mohammad Sana Ullah and Sons Vs. Firm Haji Rahim Bux and Sons](#), where it was observed:

"There were two proceedings in this case (besides the suit in which the decree was passed), (1) the execution case which is still pending in the executing Court which is hearing the judgment-debtors' objection under Order 21, Rule 90 of the CPC and (2) the appeal from the order passed by the executing Court rejecting the objection under Order 21, Rule 90. It is the first proceeding that is contemplated by the phrase "civil proceeding" in Article 133(1) of the Constitution."

16. In [Janki Prasad and Others Vs. Kailash and Another](#), on an application under Article 133 of the Constitution of India for leave to appeal to the Supreme Court, the only point raised was the question of valuation. The application was opposed on the ground that the suit which had given rise to the execution proceeding was valued at less than Rs. 10,000 & as such the applicants had no right of appeal to the Supreme Court. It was contended that the proceedings instituted under Order XXI, Rule 90, C. P. C. should not be taken to be original proceedings so as to attract the application of Article 133(1)(a) and that the valuation of the suit out of which the execution proceeding arose should be taken to be the valuation for purposes of the appeal to the Supreme Court. The case of the applicants, on the other hand, was that it was the valuation of the property which was the subject-matter of the proceeding under Order XXI, Rule 90, C. P. C. in the execution court as also in the appeal, which was to determine the question of valuation for purposes of Article 133. It was, in this connection, that Hari Shankar and Randhir Singh JJ. observed as below:

"Proceedings under Order 21, Rule 90. C. P. C. have nothing to do with the subject-matter of the suit in which the decree was passed. They are in respect of the sale of property which was not the subject-matter of the suit and as such are, in their nature, original proceedings".

17. The point in issue before the Bench was not the meaning of the term "civil proceeding" as contemplated by Article 133(1) of the Constitution of India, but what the valuation was within the meaning of Clause (a) of Article 133(1). Hence this case cannot be deemed to lay down the meaning of "civil proceeding" for purposes of Article 133(1).

18. Clause (a) of Article 133(1) speaks of "the subject-matter of the dispute in the court of the first instance and still in dispute on appeal", while Clause (b) of the "claim or question respecting property", directly or indirectly involved as a result of the judgment, decree or final order. In case of an application under Order XXI, Rule 90, C. P. C. "subject-matter of the dispute" is the immovable property sold, and hence the valuation as contemplated by Clause (a) shall be the value of the property sold. Similarly, the question raised in an application under Order XXI, Rule 90, C. P. C. is respecting the immovable property sold and it is this property which is directly

or indirectly involved. Consequently, the valuation, for purposes of Clauses (a) and (b) is the valuation of the immovable property sold, and this valuation is independent of what the "civil proceeding" for purposes of Article 133(1) may be.

19. I am thus of opinion that the meaning of the term "civil proceeding" was not meant to be decided in [Janki Prasad and Others Vs. Kailash and Another](#), and in the instant case, the "civil proceeding" for purposes of Article 133(1) of the Constitution of India is the execution proceeding based on the application of the decree-holder for execution of the decree, and not the application under Order XXI, Rule 90, C. P. C.

20. When the civil proceeding has not come to an end, the execution proceeding being still pending, the order of the High Court passed in appeal on the application under Order XXI, Rule 90, C. P. C. shall not be a final order unless it has finally and completely decided the rights or liabilities of the parties.

21. Even if it be assumed for the sake of argument that the proceeding based on the application under Order XXI, Rule 90, C. P. C. is a distinct "civil proceeding", a final order passed in the proceeding shall not be a "final order in a civil proceeding" entitling a party to appeal in each and every case, to the Supreme Court under Article 133(1) as a matter of right. What is necessary is that the order appealed against must, of its own force, bind or affect the rights of the parties. See [Seth Premchand Satramdas Vs. The State of Bihar](#); and as in the case of other "final orders" must finally and completely decide their rights or liabilities. Similarly, in [Mohd. Mohmood Hasan Khan Vs. Government of Uttar Pradesh](#), an order refusing to restore an appeal dismissed for default of prosecution, though not an interlocutory order, was held not to be a "final order" within the meaning of Article 133 of the Constitution of India.

22. This leads us to the consideration of the main question, whether an order of the High Court in exercise of the appellate jurisdiction setting aside the sale of an immovable property under Order XXI, Rule 90, C. P. C. amounts to a "final order" within the meaning of Article 133(1) of the Constitution of India.

23. The meaning of the expression "final order" has been the subject of decision for quite a long period. Section 109, C. P. C., and also the corresponding Section of the earlier Code of Civil Procedure, contains a provision for appeal, in the past, to the Privy Council, and now to the Supreme Court. Section 109, as it now exists, is subject to the provisions of Chapter IV of Part V of the Constitution of India. An appeal lay to the Privy Council against a judgment, decree or final order passed by the High Court; and the appeal now lies to the Supreme Court against a judgment, decree or final order in a civil proceeding of the High Court. Similarly, u/s 205 of the Government of India Act, 1935, an appeal lay to the Federal Court from any judgment decree or final order of a High Court if the High Court certified that the case involved a substantial question of law as to the interpretation of this Act or any

Order in Council made thereunder.

24. The law laid down by the Supreme Court on the meaning of the expression "final order" is not different to what had been expressed by the Privy Council and the Federal Court. I shall, therefore, make a reference to the Supreme Court decisions, and not encumber this judgment by making a reference to many Privy Council and Federal Court decisions.

25. In [Jethanand and Sons Vs. The State of Uttar Pradesh](#), it was held:

"An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order, the civil proceeding still remains to be tried and the rights in dispute between the parties have to be determined, the order is not a final order within the meaning of Article 133."

In this case the High Court had not decided any question relating to the rights in dispute between the parties, but had simply remanded the case for a fresh hearing. It was consequently held that the certificate under Article 133(1)(c) of the Constitution was wrongly granted by the High Court and the Supreme Court vacated the certificate and dismissed the appeal.

26. In [Shiromani Gurdwara Parbandhak Committee and Others Vs. Raja Shiv Rattan Dev Singh and Others](#), , however, the order of remand was held to be a "final order" in view of the fact that decision on three points finally determining the rights of the parties in regard to the ownership of the property had been recorded by the High Court. Reaching these two decisions along with AIR 1955 SC 14 (supra), it must be held that an order is a "final order" within the meaning of Article 133 of the Constitution of India only if it, of its own force, amounts to a final decision relating to the rights or liabilities in dispute between the parties, irrespective of whether the civil proceeding is alive or has been decided. Consequently, if the civil proceeding remains alive and the rights in dispute between the parties have to be determined, of whatever nature they may be, the order is not a "final order" within the meaning of Article 133.

27. Except for the two cases referred to in the beginning of this Judgment, all the reported cases of this Court brought to our notice are distinguishable on facts and here reference need be made to only the two Full Bench decisions and the decision in Supreme Court Appeal No. 111 of 1958 (All), wherein the scope of Article 133 and also the meaning of the words "final order" had been considered.

28. The Full Bench in the case of [Mohd. Mohmood Hasan Khan Vs. Government of Uttar Pradesh](#), laid down, by implication, the following three conditions which must be fulfilled before an order can be deemed to be a "final order" within the meaning of Article 133:

"(1) That it should not be an interlocutory order;

(2) That even though it is an order which disposes of the proceedings before a Court finally, it should not be an order which leaves the original proceedings in the Court below alive; and

(3) That there should be a final determination of the rights of the parties or the order must of its own force affect the rights of the parties."

However, what the Full Bench considered was whether the following three conditions were or were not satisfied;

"(a) That the order was an interlocutory one;

(b) that the order did not of its own force determine the rights of the parties and

(c) that the order did not either directly or indirectly raise any claim or question to property of the value of Rs. 20,000."

29. In [Savitri Devi Vs. Rajul Devi and Others](#), Beg, J. suggested the answer to the question, what is the meaning of the term "judgment" under Article 135 of the Constitution, as below:

"a judgment as contemplated therein should fulfill the following three conditions:

1. It should terminate the proceedings in the High Court.

2. It should determine the rights and liabilities of the parties.

3. The determination of the rights and liabilities as envisaged in condition No. 2 should be on merits, and should further be final and conclusive so as to cover the entire range of substantive rights and liabilities which formed the subject-matter of real controversy in the suit or proceedings which initially gave rise to the dispute."

30. In the unreported decision in Supreme Court Appeal No. 111 of 1958 (All) the order setting aside the auction sale and remanding the case for proceeding with the execution petition in accordance with the law was not regarded as a final order within the meaning of Article 133, because the execution application was alive in which the rights of the parties would still have to be determined. With due respect it may be pointed out that an additional question involved, whether the rights of the auction-purchaser had or had not been finally determined, was not considered by the Bench. On this point the opinion shall be expressed later. At this place it can simply be observed that as there was no final adjudication of such rights the order setting aside the sale under Order XXI, Rule 90, C. P. C. could not be regarded a "final order".

31. The words "it should not be an order which leaves the original proceedings in the court below alive", used in condition No. 2, laid down in [Mohd. Mohmood Hasan Khan Vs. Government of Uttar Pradesh](#), without any further qualification, are clearly against the decisions of the Supreme Court and Privy Council. In [Shiromani Gurdwara Parbandhak Committee and Others Vs. Raja Shiv Rattan Dev Singh and](#)

[Others](#), the suit was, after remand, pending before the trial Court for decision in accordance with the law. Similarly, in (1891) 18 Ind App 6 (PC) (supra) where the liability of the defendant to render account was finally determined, though accounting had still to take place; and Syed Muzhar Husain v. Bodha Bibi (1895) 22 Ind App 1 (PC), where the validity of the will was determined finally, though subordinate inquiries had still to be made, the order was held to be a "final order".

32. The test of finality was laid down in AIR 1933 58 (Privy Council) as below:

"Whether the order "finally disposes of the rights of the parties".....The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it u/s 109(a) of the Code."

It was further held that where the order did not finally dispose of the rights but left them, "to be determined by the Courts in the ordinary way" the order was not final. Also see AIR 1949 1 (Federal Court)

33. Similarly, the following part of condition No. 3 laid down by Beg, J. in [Savitri Devi Vs. Rajul Devi and Others](#), .

"to cover the entire range of substantive rights and liabilities which formed the subject-matter of real controversy in the suit or proceedings which gave rise to the dispute." is contrary to the above decisions of the Privy Council.

34. The test of finality, whether the order is a "final order" within the meaning of Article 133 of the Constitution of India, can be laid down as below:

(1) The order is not an interlocutory order.

(2) Even though it is an order disposing of the proceeding before the High Court finally, it does not leave the original proceeding in the court below alive for determination of the rights and liabilities of the parties.

(3) The order amounts to a final decision relating to the rights and liabilities of the parties in dispute in the civil proceeding, or the order, of its own force, binds or affects the rights and liabilities of the parties.

35. Coming to the facts of the instant case, the points for decision are: (1) whether an auction-purchaser has a right in the immovable property sold prior to the confirmation of the sale, i.e., the sale becoming absolute; and (2) whether there is any final adjudication of his rights as a result of the sale being set aside under Order XXI, Rule 90, C. P. C.

35a. Order XXI, Rule 92(1), C. P. C. provides that:

"Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and there-under the sale shall become absolute."

On the sale becoming absolute, the Court grants a certificate specifying the property sold and the name of the person who at the time of sale, is declared to be the purchaser (Vide Order XXI, Rule 94, C. P. C.) and the certificate bears the date on which the sale became, absolute. However, u/s 65, C. P. C. on the sale becoming absolute, the property shall be deemed to have vested in the purchaser from the time when the property was sold, and not from the time when the sale became absolute. These provisions make it clear that the auction purchaser has no absolute right of ownership or title to the immovable property sold till the confirmation of the sale and on confirmation, that is, the sale becoming absolute, the auction-purchaser acquires title from the date of the sale. But as a result of the sale the auction-purchaser does acquire an interest in the immovable property sold. In AIR 1931 33 (Privy Council) auction purchaser has been referred to as a third party whose interest has intervened and could not be disregarded. The interest that the auction-purchaser has in the property since after the sale is a substantial one, similar in some respects, though not all, to the right of a reversionary to the estate in which a Hindu widow has a life-interest. In other words, the auction-purchaser is one who has, since after the sale, a substantial right in the immovable property sold. A similar view was expressed in the Full Bench case of *Sham Singh v. Vir Bhan* AIR 1942 Lah 102 (FB).

36. In [Basant Lal Vs. Bala Misra and Others](#), an order setting aside the sale passed on an application under Order XXI, Rule 90, C. P. C., without notice to the transferee of the auction-purchaser, was held not to affect his title. Title is, I may say, with respect, something stronger than a right. The immovable property sold does not vest in the auction-purchaser till the sale becomes absolute, in other words, the confirmation of the sale, though on confirmation, the property vests in him from the date of sale. If the sale is set aside, the property does not vest in the auction-purchaser and he has no right thereto. The title of the auction-purchaser thus flows out of the order of confirmation of the sale, and for so long as no order of confirmation is passed, the auction-purchaser can have no title to the property, but he does enjoy a substantial right which he can transfer.

37. Whether there is any final adjudication of the rights of an auction-purchaser as a result of the sale having been set aside under Order XXI, Rule 90, C. P. C., depends upon whether such an order, of its own force, binds or affects his rights or amounts to a final decision relating to his rights in the property.

38. The auction-purchaser has invariably no interest in the property before the sale and he acquires an interest by making a bid in the public auction and thereby showing his willingness to purchase the property for a certain amount. On the sale being set aside the property is invariably re-auctioned in which everyone including the previous auction purchaser can take part and can make his bids for the purchase of the property. The auction-purchaser is thus in a position to again make the highest bid and acquire title to the property. At occasions, the highest bid at the

next auction may be lower than what it was in the earlier auction. At others, it may be more. The effect of the setting aside of the sale is that a person may not be able to purchase the property for the amount which he had offered at the time of the first auction. The question naturally arises whether this factor alone is sufficient to hold that the rights of the auction-purchaser had been affected or that the order setting aside the sale amounts to a final decision relating to his rights in the property.

39. If the matter is considered from a narrow outlook, it can be said that the rights of the auction purchaser are affected in view of the fact that at the time of the next auction he may not be able to acquire the property for the same amount and may have to offer more for the same property. But in determining whether the order amounts to a "final order", the question is never considered from a narrow outlook otherwise an order of remand which is clearly not a "final order", shall have to be regarded as a "final order" within the meaning of Article 133 of the Constitution of India. It is not necessary that the suit would, after remand, be decided in favour of the party who had during the trial obtained, a decree in his favour. There remains a possibility that the suit may, on retrial, be decided against him. The order of remand can thus affect the rights of a party, but such an order is not regarded as a "final order", because it does not finally adjudicate upon his rights. The rights are finally determined by the High Court only after retrial of the suit. Similarly, in the case of an auction-purchaser, when he is free to make a bid at the time of the fresh auction, It cannot rightly be said that his rights have been finally decided. I am thus of opinion that the order setting aside the sale under Order XXI, Rule 90 C P. C. does not amount to a "final order" within the meaning of Article 133. When the order sought to be challenged before the Supreme Court is not a "final order" no certificate under Article 133 can be granted.

40. I would, therefore, dismiss the application with costs and decline to grant the necessary certificate.

B. Dayal, J.

41. I agree.

D. P. Unial, J.

42. I also agree.

BY THE COURT

The application is dismissed with costs.