

(1926) 02 CAL CK 0025

Calcutta High Court

Case No: None

Kailash Chandra Tarafdar

APPELLANT

Vs

Gopal Chandra Poddar

RESPONDENT

Date of Decision: Feb. 23, 1926

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 95, 47

Citation: AIR 1926 Cal 798 : 95 Ind. Cas. 494

Hon'ble Judges: N. Rule Chatterjea, Acting C.J.; Page, J; Hugh Walmsley, J; Cuming, J;
Chakravarti, J

Bench: Full Bench

Judgement

Cuming, J.

(December 7, 1925.)---This appeal arose out of an application, for execution of a certain decree in a mortgage suit.

2. Certain properties belonging to the judgment-debtor were attached including a certain basha. On 18th December, 1916, one Mohim Chandra Chaudhuri filed a claim alleging that the basha in dispute belonged not to the judgment debtor but to him and his brother Girish. Girish also filed a separate claim. Both these claims were dismissed and the basha sold and purchased by the decree holder. Girish and Mohim filed a suit asking for a declaration that the judgment-debtor had no saleable interest in the property and the plaintiff had a putni right.

3. The suit was decreed in full but modified on appeal, the plaintiff's putni right being declared but no further relief being given.

4. The auction-purchaser who happened also to be the decree-holder applied for delivery of possession under Order XXI, Rule 95. The Executing Court held he was only entitled to possession under Rule 96, that is, through the tenant in possession. Against this order the decree-holder auction-purchaser appealed. The main contention was that there was no appeal. The lower Appellate Court allowed the

appeal and ordered the auction-purchaser decree-holder to be put into possession under Rule 95. In other words that he should get khas possession.

5. The judgment-debtor has appealed to this Court and his first and main contention is that no appeal lay to the District Court.

6. Were the matter *res interita*, I should have no hesitation in holding that no appeal lay to the District Court for these reasons.

7. Admittedly unless the matter comes within Section 47 there is no appeal.

8. In my opinion it does not come within Section 47.

(1) Because it is not a question arising between the parties to the suit. The auction-purchaser is not a party to the suit. No doubt the auction-purchaser in this case is also the decree-holder but so far as this application is concerned he is the auction-purchaser and the mere fact that he is also the decree-holder does not make him, so far as the present application is concerned, a party to the suit. The dual personalities of decree-holder and auction-purchaser must be kept distinct. The case of *Prosunno Kumar Sanyal v. Kali Dasi Sanyal* 19 C. 683 : 19 I.A. 106 : 6 SP.C.J. 209 : 9 Ind. Dec. 898 , a decision of the Privy Council, does not support the proposition that the auction-purchaser can maintain a petition u/s 47. What was held there was that the fact that the auction-purchaser although not a party to the suit was interested in the result was not a bar to an application u/s 244 (Section 47). But this is not the same as saying that the auction-purchaser could maintain such an application.

(2). It is not a matter relating to the execution, discharge or satisfaction of the decree.

9. So far as the satisfaction or discharge of the decree is concerned it is immaterial whether the auction-purchaser is or is not put into possession. The decree is satisfied when the property is sold and the money paid. The question turns on whether an application by the auction-purchaser for possession falls within Section 47. If it does there is an appeal. If not there is no appeal. In the case of *Mahomed Nosaraf v. Habil Mia* 6 C.L.J. 749. the decree holder, who was the auction-purchaser applied for possession and an order was passed directing that possession should be given. Held no appeal lay as the application could not be considered as one u/s 244 (Section 47).

10. This decision followed *Bhimal Das v. Ganesha Koer* 1 C. W. N. 658. In the case of *Sasibhu Shan Mookerjee v. Radhanath Bose* 25 Ind. Cas. 267 : 20 C.L.J. 433 : 19 C.W.N. 835, it was held that an order for possession (Rule 95) was not an order relating to the execution, etc., of the decree even though the auction-purchaser was the decree-holder and so did not fall within Section 47.

11. In the case of Aduram Haldar v Naku-leswar Rai Chowdhury 49 Ind. Cas. 137 : 29 C.L.J. 48. this decision was followed. The contrary view has been taken in the case of Madhusudan Das v. Gobinda Pria Chowadhurani 27 C. 34 : 4 C.W.N. 417 : 14 Ind. Dec 23., where it was held that proceedings for the delivery of possession to the auction-purchaser are proceedings in execution of the decree and when the application is resisted by the legal representative of the judgment-debtor, the question raised comes u/s 244 (Section 47).

12. In Ram Narain Sahoo v. Bandi Pershad 31 C. 737, it was held that proceedings for the delivery of possession to an auction-purchaser who is also a decree-holder are proceedings in execution of the decree and come u/s 244 (Section 47). It will thus be seen that there are directly conflicting decisions in this Court and the question must be referred to a Full Bench.

13. The question to be referred is; Whether an order passed on an application under Order XXI, Rule 95, by an auction-purchaser, who was the decree-holder, is an order u/s 47 of the C. P. C. and appealable as such.

B. B. Ghose, J.

14. (December 7, 1925).--- I agree that the question should be referred to the Full Bench on account of conflict of decisions in this Court.

15. Babus Brojolal Chakravarti and Paresh Lal Shome, for the Appellant.

16. Babu Hemendra Kumar Das, for the Respondent.

N. R. Chatterjea, A. C. J.

17. The question referred to the Full Bench is "Whether an order passed on an application under Order XXI, Rule 95 by an auction-purchaser, who was the decree-holder, is an order u/s 47 of the C.P.C., and appealable as such". The decree-holder purchased certain property at a sale in execution of a decree under Order XXXIV, Rule 6, and applied for delivery of khas possession under Order XXI, Rule 95. The Executing Court held that he was entitled to possession under Rule 96 that is through the tenant in possession. The decree-holder, auction-purchaser appealed and the Appellate Court allowed the appeal and ordered that he be put in possession under Rule 95, in other words that he should get khas possession.

18. The judgment-debtor appealed to the High Court and the main contention was that no appeal lay against the order of the execution Court.

19. An appeal would lie if the case comes u/s 47 of the C. P. C. The question whether it falls within that section of the Code depends upon

(i) Whether the question arises between the parties to the suit or their representatives, and

(ii) Whether it relates to execution discharge or satisfaction of the decree.

20. The first question, therefore, is whether the decree-holder, auction-purchaser, is a party to the suit. The decree-holder is undoubtedly a party to the suit, and the only question is whether he ceases to be a party to the suit after the sale.

21. Reliance is placed on behalf of the respondent on the case of *Ganapathy Mudaliar v. Krishnamachariar* 44 Ind. Cas. 855 : 45 I.A. 54 : 27 C.L.J. 367 : 23 M.L. T. 198 : 34 M.L.J. 463 : 4 P.L.W. 310 : (1918) M.W.N. 310 : 22 C.W.N. 553 : 16 A.L.J. 353 : 41 M. 403 : 20 Bom. L.R. 580 : 8 L.W. 427 , where the Judicial Committee observed: "This Board decided in *Prosunno Kumar Sanyal v. Kali Dasi Sanyal* 19 C. 683 : 19 I.A. 106 : 6 S. P.C.J. 209 : 9 Ind. Dec. 898 . that Section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction-purchaser at an auction sale as well as the parties to the suit. In this case the Vakil (the decree-holder) was the auction-purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing decree of the 15th November 1886." The property was sold in execution of a mortgager decree and purchased by the decree-holder, and after confirmation of the sale the mortgagor brought a suit for redemption. The question, therefore, could have been raised before the confirmation of the sale. But the case is relied upon to show that the decree-holder is referred to by their Lord-ships as a party to the suit even after the sale.

22. The question whether the decree-holder qua purchaser is a party to the suit was fully considered by a Full Bench of the Allahabad High Court in the case of *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71. Banerji, J., Aikman and Griffin, JJ., answered the question in the negative, while Stanley, C. J., and Knox J, held that he is a party to the suit. Banerji, J., observed that "although the same person may be the decree-holder and the auction-purchaser, he fills two different capacities, and it is in the latter capacity that he can obtain possession", Reference was, made to the case of *Mahdbir Pershad Singh v. Macnaghten* 16 C. 682 : 16 I.A. 107 : 13 Ind. Jur. 133 : 5 S P.C.J. 345 : 8 Ind. Dec. 451 to show that the decree-holder who purchases the mortgaged property at auction with the leave of the Court is in the same position as any independent purchaser But what was meant by Lord Watson in that case was that in leave to bid puts an end to the disability to purchase, and he is on the same footing (with respect to the right to purchase,) as strangers to the suit who may bid at the sale. The view that the decree-holder, auction-purchaser fills two different capacities was also taken by Mookerjee and Beachcroft JJ., in *Sasibhusan Mookerji v. Radhanath Bose* 19 A. 477 : (1897) A.W.N117 : 9 Ind. Dec. 308. and the learned Judges relied among other cases on the decision of the majority of the Full Bench of the Allahabad Court referred to above. Stanley, C. J, on the other hand, in the case of *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 5 M.L.T. 185 : 6 A.L.J. 71. observed that the recognition of such a dual personality in a decree-holder auction-purchaser would be to introduce a strange and novel legal fiction, into our jurisprudence, and that it is difficult to see how the character of

decree holder can be split up into two distinct characters so as to enable him to override the provisions of Section 244.

23. Reference was also made by Banerji, J., in the Allahabad case to Article 138 of the Limitation Act under which a suit may be brought by an auction-purchaser for recovery of possession within twelve years from the date of the auction-sale, and it was observed that, in that Article no distinction is made between different classes of auction-purchaser, and that there is no reason for holding that if the decree-holder happens to purchase at an auction-sale, he has a shorter period of limitation for obtaining possession than any other purchaser, as it is only in the capacity of auction-purchaser that he can obtain possession. But that Article regulates the period of limitation, whereas Section 47 of the C. P. C. regulates the remedies open to the parties to the suit in which the decree is passed when any question arises between them relating to the execution, discharge or satisfaction of the decree. Article 138 of Limitation Act cannot, therefore, override the provisions of Section 47 of the Code.

24. Then there are good reasons for the difference between an auction-purchaser who is the decree-holder, and a stranger auction-purchaser. The latter is not expected to go behind the decree, whereas the decree-holder who has obtained the decree knows all that need be known about the property, and in his case there is no hardship in confining his remedy to proceedings in execution. It has been repeatedly held that the provisions of Section 244 should be liberally construed. The Judicial Committee in the case of *Prosunno Kumar Sanyal v. Kali Dasi Sanyal* 19 C. 683 : 19 I.A. 106 : 6 S P.C.J. 209 : 9 Ind. Dec. 898. referred to above, observed "it is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of Section 244". That a wide and liberal construction should be placed on the section was also recognised in *Set Umedmal v. Srinath Ray* 27 C. 810 : 4 C. W. N. 692 : 14 Ind. Dec.530. and *Ishan Chunder Sirkar v. Beni Madhub Sirkar* 24 C. 62 : 1 C.W.N. 36 : 12 Ind. Dec.707.

25. The decree-holder, for certain purposes at any rate, is treated as a party to the suit even after the sale and stands on a different footing from an ordinary purchaser. For instance, when a sale takes place in execution of a decree and the decree is afterwards set aside, it does not affect an auction-purchaser who is a stranger to the suit, whereas in the case of the decree-holder himself who has purchased at the sale, the sale must be set aside. In the case of *Zainul-Abdin Khan v. Muhammad Asghar Ali Khan* 10 A. 166 : 15 I.A. 12 : 5 S P.C.J. 129 : 6 Ind. Dec.112 . Sir Barnes Peacock in delivering the judgment of the Judicial Committee observed: " It appears to their Lordships 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. A great distinction has been made between the case of bona fide purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves."

26. The decree-holder is treated as a party to the suit even after the sale in cases coming under the proviso to Section 133 Bengal Tenancy Act. See *Kali Mandal v. Ramsarbaswa Chakravarti* 32 C. 957 : 1 C.L.J. 476; 9 C.W.N. 721.

27. Then again it was held in cases coming u/s 311 of the Code (of 1882) that no second appeal lay unless the decree-holder was the purchaser or unless there was fraud in the sale.

28. With regard to the second question, the view taken in some cases is that proceedings for delivery of possession cannot in any way affect the decree or the sale, and do not relate to execution, discharge or satisfaction of the decree as the decree is executed and discharged by the sale. See *Bhimal Das v. Ganesha Koer* 1 C. W. N. 658.; *Mahomed Mosraf v. Habit Mia* 6 C.L.J. 749.; *Jagarnath Marwari v. Kartick Nath Pandey* 7 C.L.J. 436.; *Sasibhushan Mookerjee v. Radhdnath Bose* 19 A. 477 : (1897) A.W.N117 : 9 Ind. Dec. 308.; *Aduram Haldar v. Nakuleswar Rai Chowdhury* 49 Ind. Cas. 137 : 29 C.L.J. 48. and *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71. (majority of the Full Bench in the Allahabad High Court); *Abdul Gani v. Raja Rant* 35 Ind. Cas. 468 : 20 C. W. N. 829 : P.L.H. 232 : 3 P.L.W. 62.

29. On the other hand it has been held in a large number of cases that such proceedings relate to execution of decree when the decree-holder is the purchaser. See *Madhusudan Das v. Gobinda Pria Chowahurani* 27 C. 34 : 4 C.W.N. 417 : 14 Ind. Dec 23.; *Ram Narain Sahai v. Bandi Pershad* 31 C. 737; *Sariatoolla Molla v. Raj Kumar Ray* 27. C. 709 : 4 C.W.N. 681 : 14 Ind. Dec. 466. and *Hari Charan Dutt v. Mon Mohan Nandy* 20 Ind. Cas. 874 : 18 C.W.N. 27.; in the Madras High Court *Muthia v. Appasami* 13 M. 501 : 4 Ind. Dec. 1663.; *Katayat Pattumayi v. Raman Menon* 26 M. 740 : 13 M.L.J. 237. and *Sandhu Taraganar v. Hussain Sabib* 23 M. 87 : 14 M.L.J. 474. in the Bombay High Court *Sadashiv Mahadu Dhole v. Narayan Vithal Mawal* 11 Ind. Cas. 987 : 35 H. 452 : 13 Bom. L.R. 661. and the dissentient judgment of Stanley, C. J., and Knox, J., in the Full Bench *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71.

30. The learned Pleaders on either side have attempted to distinguish the cases against him. It will not be profitable to discuss the cases, though some of the cases on either side may be distinguished on the facts. The main ground upon which the decision in the first set of cases proceeds is that as soon as the sale is confirmed and becomes absolute, the execution of the decree is at an end and the decree is not affected by farther proceedings such as those relating to delivery of possession.

31. It is true that when the sale is confirmed, the title of the purchaser becomes absolute. That means that the title of the purchaser cannot be challenged by the judgment-debtor. But the sale cannot be said to be complete without delivery of possession of the property sold.

32. The property purchased represents the money for which he obtained his decree. It is to be observed that the decree-holder has to purchase with the permission of the Court, and under Order XXI, Rule 72, the purchase-money and the amount due on the decree may be set off against one another. But the decree-holder does not actually get the benefit of the money due under his decree until he gets possession of the property of the judgment-debtor purchased by him. He is entitled to ask the Court to put him in possession of the property purchased, and the Court is bound to give him possession.

33. The arrangement of the provisions of the Code relating to execution indicates that proceedings for delivery of possession are proceedings relating to execution of the decree. The general heading of Order XXI is "execution of decrees and orders." Then there are several sub-headings. Rules 82 and 96 deal with sales of Immovable property. Rules 95 and 96 relating to delivery of property sold in execution are under the same sub-heading as Rules 82 to 94 which deal with sales (and it cannot be disputed that the provisions relating to sales relate to execution of decree), and the whole as already stated appear under the same general heading "execution of decrees and orders."

34. It may also be pointed out that Section 74 and Order XXI, Rules 97 to 101 of the Code make the same provision for the purchaser of Immovable property as for the holder of a decree for possession of Immovable property in connection with "resistance to execution," which indicates that the Legislature regards the delivery of possession to the purchaser as a proceeding in execution of the decree.

35. It appears, therefore, that the Court in delivering possession of the property sold, does so under the provisions relating to execution of decree, and it is difficult to see how else it can deliver such possession. It is said that such delivery is made under the summary powers given by the Code, that it is merely incidental to the sale, and the contest arises as the result of the sale. Even if it is so, it relates to execution of the decree. Such proceedings may not affect the decree, nor impeach the sale, but when the question arises as to the kind of possession to be delivered it is a question relating to the execution of the decree.

36. Then it has been held that an application by a decree-holder to be put in possession of the property which he purchased in execution of the decree is a step-in-aid of execution of the decree; see *Sariatoola Molla v. Raj Kumar Roy* (17).

37. The question is merely one relating to procedure, and the weight of authority, I think, is in favour of the view that where the auction-purchaser is the decree-holder any question relating to delivery of possession comes u/s 47 of the Code. I am of

opinion that the question referred should be answered in the affirmative.

Walmsley, J.

38. I have had the advantage of reading the judgment which my learned brother Page is about to deliver, and for the reasons which he gives I agree with him as to the answer to the question.

Cuming, J.

39. The question that has been referred to the Full Bench is whether an order passed on an application under Order XXI, Rule 95 by an auction-purchaser who was the decree-holder, is an order u/s 47 of the C. P. Order and appealable as such.

40. I am of opinion that it is not for two reasons:--(1). The auction-purchaser even though he is also the decree holder is not a party to the suit.

41. (2). An application under Order XXI, Rule 95 is not a matter relating to the execution, discharge or satisfaction of the decree.

43. I do not propose to deal with any of the numerous authorities which have been cited before us except those of the Privy Council. As a Full Bench none of the authorities except those of the Privy Council or the decision of a Full Bench of our own Court are binding on us. The various decision are clearly in direct conflict otherwise the reference would be unnecessary and we are in the fortunate position that we have only to consider the plain words of the Code and the decisions of the Privy (Council or Full Bench of this Court so far as they interpret the sections we are now considering.

44. I take up the first point which is whether the auction-purchaser even though he is the decree-holder is a party to the suit or his representative-in-interest. I am of opinion that he is not. The parties to the suit are the persons who actually contest the suit as plaintiff or defendant up to the time of the passing of the decree. The auction-purchaser has nothing to do with the suit and quite possibly does not know of its existence. If the auction-purchaser is also the decree-holder that makes no difference. A person may have a dual capacity. As a decree-holder he is a party and can maintain an application u/s 47. But in his capacity of auction-purchaser he is not a party and cannot maintain an application u/s 47. He applies to be put into possession in his capacity of auction-purchaser and not of decree-holder. It is the failure to keep separate the two capacities which has led to much of the confusion and conflicting decision in the different Courts. Such dual capacities are well known, i.e., a person may be on the record in his personal capacity and at the same time as the guardian of a minor or executor. They are quite separate and distinct. My attention has been drawn to two decisions of the Privy Council, the case of *Prosunno Kumar Sanyal v. Kali Dasi Sanyal* 19 C. 683 : 19 I.A. 106 : 6 S P.C.J. 209 : 9 Ind. Dec. 898 ., and the case of *Ganapathy Mudaliar v. Krishnqmachariar* (8), from which decisions it is sought to establish the proposition that where the auction-purchaser

is also the decree-holder he becomes as auction-purchaser a party to the suit. I am unable to discover after a very careful consideration of these decisions that they establish any thing of the sort. What the first case *Prosunno Kumar Sanyal v. Kali Dasi Sayal* 19 C. 683 : 19 I.A. 106 : 6 Sar. P.C.J. 209 : 9 Ind. Dec. 898 . decided was that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section, Their Lordships do not say even that in such circumstances the auction-purchaser is to be made a party to the proceeding. If I read the decision correctly it is this that the fact that there may be a third party not a party to the suit but interested in the result is no bar to the parties to the suit having a question between them relating to the execution, discharge or satisfaction of the decree decided u/s 244 (Section 47). The facts in that case were that it had been held that Section 244 C. P. C. was a bar to the suit and learned Counsel argued that the suit was not barred because the auction-purchaser being interested it could not be described properly as a question arising between the parties to the suit in which the decree was passed. The Privy Council held that the fact that the auction-purchaser was interested was no bar to the application of the section or in other words, to the decision of the question between the parties to the suit. It certainly cannot be held on the strength of this decision that the auction-purchaser can even or should be made a party to the proceedings.

45. With regard to the second case *Ganapathy Mudaliar v. Krishnamachriar* (8) learned Counsel to support his contention would rely on the following words in the judgment:

This Board decided in *Prosunno Kumar Sanyal v. Kali Dasi Sanyal* 19 C. 683 : 19 I.A. 106 : 6 Sar. P.C.J. 209 : 9 Ind. Dec. 898 . (The case I have first referred to,) that Section 244 (Section 47) had been rightly held in India to apply in a case in which the question raised concerned the auction-purchaser at an auction-sale as well as the parties to the suit. In this case the Vakil was the auction-purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the Court which was executing the decree.

46. (I hardly see how this decision support the contention of the learned Vakil.)

47. The report of the case is somewhat meagre so far as the facts are concerned but the facts would seem to be as follows:

48. The suit was brought to redeem three mortgages. The plaintiff was the son of the mortgagor and the defendant was the son of the mortgagee. It would appear that in 1886 the mortgagee had brought a suit on the mortgage-bond which was decreed.

49. The plaintiffs in this present suit were then minors and represented by their fathers. The suit was decreed, the property sold and purchased by the decree-holder. There were various objections to the execution of the decree, which were all disallowed. The present suit was instituted in 1907 and what seems to have been held was that Section 244 was a bar to the suit because all the questions raised in the present suit of 1907 could have been raised before the sale was confirmed. Their Lordships relied on the principle laid down in *Prosunno Kumar's case* 19 C. 683 : 19 I.A. 106 : 6 Sar. P.C.J. 209 : 9 Ind. Dec. 898 . , that such question could be raised between the parties to the suit u/s 244 even though the auction-purchaser was concerned as well as the parties to the suit. Their Lordships simply stated as a fact that in that particular case the auction-purchaser was the same person as the decree-holder who was admittedly a party.

50. But this decision is no authority for the contention that if the auction-purchaser is also the decree holder he becomes as auction-purchaser a party to the suit. In my opinion these two decisions are authority only for the proposition that even though third parties who are not parties to the suit are interested or concerned that is no bar to the question between the parties being decided u/s 244 (Section 47). They are not even authorities for the proposition that the auction-purchaser should be made a party to such proceedings nor for the proposition that if the auction-purchaser is the same person as the decree-holder he is as auction-purchaser a party to the suit.

51. There is yet a further point which has to be considered. If the auction-purchaser who happens to be a decree-holder must proceed u/s 47 his period of limitation is restricted to 3 years. A stranger is allowed 12 years to bring his suit. Is there any good reason for thinking that there is a different period of limitation for the decree-holder auction-purchaser and the stranger auction-purchaser?

52. Neither can it be said that the auction-purchaser is a representative in interest of either the judgment debtor or decree-holder. If he were we should get the extraordinary position of a person making an application against himself.

53. To sum up the point:

54. The auction-purchaser qua auction-purchaser is not a party to the, suit and the fact that he is also the decree-holder does not alter his position in any way or make him in a matter in which he is concerned in the capacity of auction-purchaser a party to the suit. Neither of the decisions of the Privy Council to which I have been referred would justify the contention that an auction purchaser even though he is also the decree-holder is in any way in a different position to a stranger auction-purchaser. He is, therefore, not a party to the suit and any question decided between him and any other person whether a party or not to the suit is not a question decided u/s 47.

55. On this ground alone, therefore, the reference should be decided in the negative. The next question is whether an order passed on an application under

Order XXI, Rule 95 is a question relating to the execution, discharge or satisfaction of the decree. I am of opinion that it is not. When the property is sold, money paid and sale confirmed, so far as the decree and the decree-holder are concerned; nothing more is to be done. So far as the execution of the decree is concerned and by that I presume is meant the realization by the decree-holder of the fruits of his litigation it makes no difference whatever whether the purchaser does or does not obtain possession. The decree is satisfied by the sale of the property and the payment to the decree-holder of the money so realized. The auction-sale is complete when confirmed. It may be set aside for various reasons but failure to get possession by the auction-purchaser is not one of them and the validity of the sale does not depend on the purchaser getting possession. The purchaser does not get possession by virtue of the decree. He gets possession by virtue of the sale. The application for delivery of possession is one of the results of the execution of the decree after it has been executed but it does not relate to the execution of the decree.

56. The expression "which relates to the execution of the decree means, I think, question which, arisen up to and concerns the actual execution which terminates with the confirmation of the sale and the paying of the money to the decree-holder, not to question which may arise after execution is complete and are really results of the execution. The further argument has been put forward that the decree-holder purchaser gets the property in lieu of the money he is entitled to under the decree and hence until he is put in possession the decree has not been satisfied.

57. The argument is obviously a fallacious one. If it had any substance then on the failure of the decree-holder purchaser to get possession after his purchase he would be entitled to again execute the decree for the amount he had paid for the purchased property for his decree would then have to be considered as unsatisfied to that extent.

58. I need hardly say that he cannot at least I have never heard it even suggested that he could.

59. He does not get the property as an equivalent to the amount of his decree for which the property was sold. As purchaser, he has to pay the purchase-money which he does either in cash or by setting it off against the amount of his decree.

60. Both the points on which this reference depends have been dealt with by Banerji, J., in the case of *Bhagirati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71. His judgment may be referred to for it would be difficult to improve on his reasoning and argument. A further argument has been put forward that Rules 95 and 96, the rules relating to the delivery of possession find a place under Order XXI---which order he headed "Execution of decree"---and hence this must relate to the execution of the decree.

61. I may point out that the order is headed "Execution of decrees and orders," and not of decree only.

62. On application under Rule 95 and Rule 96 the Court orders delivery of possession to be made and this order the Court executes. If it were part of the execution of the decree no further order would be necessary. Hence the Court in putting a party in possession under Rules 95, 96, 97, 98 is not executing: the decree.

63. I am of opinion that an application by the auction-purchaser to be put in possession does-not relate to the execution, discharge or satisfaction of the decree and hence does not fall u/s 47.

Page, J.

64. In this case the holder of a personal decree for money due under a mortgage having purchased certain Immovable property of the judgment-debtor at an auction-sale held in execution of the decree applied for delivery of, possession under Order XXI, Rule 95. The first Court ordered that symbolical possession of the property should be given to the applicant under Order XXI, Rule for on the ground that only the maliki right in the said property passed on the sale. On appeal the Court held that the applicant was entitled to delivery of khas possession, and an order was passed under Order XXI, Rule 95. On a further appeal to the High Court a Division Bench (Cuming and B. B. Ghose, JJ.,) has referred to the Full Court the following question, " whether an order passed on an application under Order XXI, Rule 95 by an auction-purchaser who was the decree-holder is an order u/s 47 of the C. P. C. and appealable as such." Now, it is highly desirable that questions of practice and procedure should be settled and that this matter, which has been allowed to remain in a state of flux for more than thirty years, should now finally be determined. The High Courts in India have given inconsistent answers to the question propounded, and whereas the Madras High Court in Sandhu Taraganar v. Hussain Sahib (21) has expressed the opinion that it is definitely settled that from such an order an appeal will lie, the Patna High Court on the contrary is equally emphatic that an appeal does not lie, and that the Courts in India ought so to hold "as if it were a settled *cursus curiae*." Abdul Gani v. Raja Ham 35 Ind. Cas. 468 : 20 C. W. N. 829 : P.L.H. 232 : 3 P.L.W. 62. Thus the oracle has spoken both at Delphi and at Dodana, and it remains for this Court to determine to which voice it ought to barken. In Bombay the High Court has held that the answer to the question should be given in the affirmative: Sadashiv Mahadu Dhole v. Narayan Vithal Mawal (22), while in Allahabad by a majority of three Judges to two a Full Bench of the High Court has given an answer in the negative. Thus the views of other High Courts on the subject are sharply divided. In the Calcutta High Court also there has been a marked diversity of opinion, and the problem remains unsolved: Bhimal Das v. Ganesha Koer 1 C. W. N. 658.; Mahomed Masraf v. Habil Mia 6 C.L.J. 749.; Sasibhu-shan Mookerjee v. Radhanath Bose 19 A. 477 : (1897) W.A.N117 : 9 Ind. Dec. 308.; contra Madhusudan Das v. Gobinda Pria Chowdhurani 27 C. 34 : 4 C.W.N. 417 :

14 Ind. Dec 23.; Ram Narain Sahai v. Bandi Pershad 31 C. 737 and Iari Charan Dutt v. Mon Mohan Nandy 20 Ind. Cas. 874 : 18 C.W.N. 27. Indeed, two learned Judges (Brett and Stephens, JJ.,) appear to have decided the question both ways. With such assistance as may be derived from opinions so diverse it is incumbent upon us, therefore, to put our own construction upon Section 47, and Order XXI of the C.P.C. From the terms of the section it is apparent that in order that an appeal should lie u/s 47 it is necessary that the application should involve the determination of a question "relating to the execution, discharge or satisfaction of the decree," and that the question should be one "arising between the parties to the suit in which the decree was passed, or their representatives."

65. Now "it is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible," Prosunno Kumar Sanyal v. Kali Dasi Sanyal 19 C. 683 : 19 I.A. 106 : 6 Sar. P.C.J. 209 : 9 Ind. Dec. 898. and Sardhari Lal v. Ambika Pershad 15 C. 521 : 15 I.A. 123 : 5 Sar. P. C. J. 172 : 12 Ind. Jur. 210 : 7 Ind. Dec. 931 . I think it is clear that the Legislature by enacting Section 47 and Order XXI intended that when persons had entered upon litigation the decree so far as possible should be worked out in the proceedings in which it was passed. It is to be observed that Order XXI which is headed "execution of decrees and orders" includes not only Rules 95 and 96 which provide for delivery of possession of the property sold under the decree, but also Rules 97-103 which relate to and are headed "Resistance to delivery of possession to decree-holder or purchaser." It would appear, therefore, that the Legislature intended that the matters for which provision was made in Rules 95---103 should be regarded as an integral part of the proceedings in execution of the decree. It is urged, however, on behalf of the appellant, that after the sale has become absolute under Rule 92, the sale is complete, and inasmuch as an order for delivery of possession under Rule 95, necessarily must be passed after the sale has become absolute and a certificate has been granted under Rule 94, such an order cannot relate to the execution of the decree, for such an order in the language to be found in some of the cases could not in anyway "affect the decree": Bhimal Das's case (3) and Mohamed Mosrafs case 6 C.L.J. 749. This contention is concisely put by Mookerjee, J., in Sasibhushan's case 19 A. 477 : (1897) W.A.N117 : 9 Ind. Dec. 308. where his Lordship observed that "if the application was granted, it could not give greater validity to the order for confirmation of sale than it possessed. On the other- hand, if the application for delivery of possession was refused, it could not invalidate the sale." With all due deference, however, in my opinion, this contention is not well founded. The validity of the sale is one thing, its completion is quite another, and I respectfully agree with Stanley, C. J., when he expressed the view that "so long as the land remains in the possession of the mortgagors the debt to the extent of the price cannot be said to have been satisfied. The fallacy of the argument advanced on behalf of the appellants lies as it appears to me in the assumption that on the grant of the certificate of sale the decree was "completely executed and satisfied, and the decree

was not I think, satisfied so long as possession was withheld by the mortgagors from the decree-holder" *Bhagwati v. Bamvari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71.; *Madhusudan Das v. Gobinda Pria Chowdhurani* 27 C. 34 : 4 C.W.N. 417 : 14 Ind. Dec, (n. s.) 23.; *Sariatoola Moola v. Raj Kumar Roy* (17). But even if it were held that the sale was complete without delivery of possession it would not avail the appellant, for in order to bring an application under Rule 95 within the ambit of Section 47, it is not essential that delivery of possession should form an integral part of the sale, it is enough that the question arising on such an application should relate to " the execution, discharge or satisfaction of the decree." That such questions do relate to the execution of the decree appears to me to be free from doubt for the two following, among other, sufficient reasons: (1) because the benefit which a decree-holder who is also the purchaser at the execution sale will derive from executing the decree largely depends upon the nature and extent of the possession which he can obtain of the property that he has purchased. Until he has been given possession of the property that he has purchased at the execution sale he has not fully secured the fruits of the decree, and, therefore, "a proceeding in execution cannot be said to be completed (at least so far as a decree-holder is concerned) in a case of sale until he has obtained the proceeds and benefit of the sale held in execution of his decree, and the execution of his decree cannot be said to be satisfied until in the one case he has received the purchase-money paid into Court, and in the other until he has been put into possession, of the property of the judgment-debtor which (2) he has purchased," per. *Edge, G.J. and Blair, J., in Moti Lal v. Makund Singh* (24): (II). Because it is not every purchaser of property who is entitled to take advantage of the provisions of Order XXI, Rules 95---98, but only those purchasers who have bought Immovable property at a sale held in execution of a decree. The Court would have no jurisdiction to entertain an application under Rules 95---98 by a person who has purchased property by private treaty or at a sale unconnected with execution proceedings, for unless the sale was held in the course of or pursuant to execution proceedings it is clear from the terms of the rules that the purchaser would have no locus standi to prefer an application under Rules 95---98. For these reasons, therefore, I have no hesitation in holding that questions arising in an application under Rule 95 for the delivery of possession are questions "relating to the execution, discharge or satisfaction of the decree." I am also of opinion that questions arising in an application under Rule 95 by a decree-holder or his representatives-in-interest against the judgment-debtor or his representatives-in-interest are questions " arising between the parties to the suit in which the decree was passed or their representatives."

66. Now, it is common ground that a person who purchases the property sold in execution of a decree derives his title to the property from the sale and not from the decree, whether the purchaser is the decree-holder or a transferee of the decree-holder's interest in the decree, or a stranger to the suit. Upon that footing the appellant contends that questions which fall for determination in an application

under Rule 95 and the following rules do not arise between the parties to the suit or their representatives, for such an application can only be made by a purchaser, the decree-holder or a transferee of a decree-holder's interest in the decree as such having no locus standi to prefer an application under these rules, see per Banerji, J., in *Ghulam Shabbir v. Dwarka Prasad* 18 A. 36 : (1893) W.A.N.149 : 8 Ind. Dec. (n. s.), and *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71., per Mookerjee, J., in *Sasi Bhusan Mooker-jees case*, 19 A. 477 : (1897) W.A.N.117 : 9 Ind. Dec. (n. s.) 308. It is urged that in respect of such an application a decree-holder must be taken to have shed his status as a party to the suit, and can be regarded only in the capacity of the purchaser of the property. I agree with Stanley, C. J., that "the recognition of such a dual personality in a decree-holder purchaser would be...to introduce a strange and novel legal fiction into our jurisprudence." *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71.. Indeed such a contention appears to me to run counter to the object and effect of the sections and orders of the Code relating to execution. As I read the Code the object of Section 47 was, "to provide for the speedy determination of any question between the decree-holder and the judgment-debtor, should any still be left at such a late stage of the litigation between them. A decree-holder who has fought out his case, won his decree and carried it possibly into several Courts of appeal and who elects to buy the property of his judgment-debtor which he has put up to auction, ought to be in a position to know all that need be known about the property. He had ample means in the suit and under the procedure which regulates execution to find out all that need be known. It is to the interest of all that the litigation should be put to an end", [per Knox, J., in *Bhagwati's case* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71.] The Legislature in Section 47 has placed the representatives of the parties in the same position as the parties themselves, and the term "representatives" in Section 47 must, in my opinion, be held to include persons who, by assignment from a party or by operation of law have succeeded to the interest of that party in the decree, and quoad that interest are bound by the decree. The intention of the Legislature was that the parties and their representatives should be compelled to work out the decree in the proceedings in which it was passed, and ought not to be permitted to reagitate such matters by launching forth into fresh litigation. It is urged that if such a view were to be upheld a decree-holder purchaser would suffer hardship, for whereas a stranger to the suit who has purchased property that has been sold at an execution sale, is not confined to an application under Rule 95, but may bring a suit for possession within 12 years (Article 138 of Schedule I of the Limitation Act, 1908): *Kishori Mohun Roy Chowdhury v. Chunder Nath Pal* 14 C. 644 : 7 Ind. Dec. 427., a decree-holder who has purchased at such a sale, and whose title is derived from the same source as that of the stranger purchaser, must needs proceed under Order XXI, Rule 95 if he desires to obtain delivery of possession, and only has three years within which he can make the application (Limitation Act Schedule J, Article 181. But the plea of hardship in the circumstances cannot, I think, be sustained, for the decree-holder obtains ample compensation for this restriction upon his rights as a

purchaser in the speedy and summary method by which he is enabled to secure possession of the property under Order XXI, Rule 95---103. On the other hand, a stranger to the suit who has purchased property at the execution sale is not, and ought not to be, placed in *pari conditione* with the parties to the suit or their representatives. He is not a party to the litigation and has no control over it; he is not bound by the decree; and if the decree is varied or reversed after the sale what is that to him? His rights are not affected by a subsequent alteration in the decree, for "bona fide purchasers who were no parties to the decree which was then valid and in force have nothing to do further than to look to the decree and to the order of sale." *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (13). It is because a purchaser who is not a party to the suit is not concerned with the litigation in the course of which the sale has taken place that his action in relation to the purchase is not within the purview of the Code, and has not been brought within Section 47. The object of the Legislature in enacting Section 47 and the rules in Order XXI, "relating to the execution, discharge and satisfaction of the decree" was to provide a ready and inexpensive method by which a decree should be worked out, and to restrict the power of the parties unduly to prolong the litigation. With such matters a stranger purchaser has no concern.

67. Now, it is not contended that after the execution sale has become absolute the decree-holder ceases to be a party to the suit, and I can find no justification for refusing to recognize his real position as a party to the suit merely because he has himself purchased property sold in execution of a decree which he has obtained, for whether he purchases the property at the execution sale or does not do so in either case he remains in law and in fact a party to the suit, and bound by the decree which has been passed.

68. In my opinion, both upon a true construction of Section 47 and Order XXI, and in accordance with the better opinion to be collected from the authorities the contention of the appellant must be rejected: *Prosunno Kumar Sangal*'s case 19 C. 683 : 19 I.A. 106 : 6 Sar. P.C.J. 209 : 9 Ind. Dec. 898., *Ganapathy*'s case (8); *Dwar Buksh Sirkar v. Fatik Jali* 26 C. 250 : 3 C.W.N. 222 : 13 Ind. Dec. 765.; *Madhusudan Das v. Gobinda Pria Chowdhurani* 27 C. 34 : 4 C.W.N. 417 : 14 Ind. Dec 23.; *Sariaioolla Molla v. Raj Kumar Roy* 27 C. 709 : 4 C.W.N. 681 : 14 Ind. Dec. 466; *Moti Lal v. Makund Singh* (24); *Kasinatha Ayyar v. Uthvmansa Row-than* 25 M. 529 : 12 M.L.J. 1. and *Sadashiv Mahadu Dhole V. Narayan Vithal Mawal* (22).

69. For these reasons I would answer the question propounded in In? the affirmative.

Chakravarti, J.

70. The question preferred to the Full Bench is as follows:---"Whether an order passed on an application under Order XXI, Rule 95, C. P. C., by an auction-purchaser who was also the decree-holder, is an order u/s 47 of the C.P.C., and appealable as

such".

71. The facts are stated in the order, of reference and need not be re-stated.

72. Section 47 of the C. P. C., runs as follows. "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."

73. In order to arrive at a conclusion in this matter two questions arise: First: Is a proceeding under Order XXI, Rule 95, C. P. C., a proceeding "relating to execution of the decree."

74. After a property is sold in execution, the Court occupying the position of the vendor has to deliver possession of the property sold by it to the purchaser. This duty Court undertakes in order to complete the sale by which the money due to the decree-holder has been realised. These proceedings may not be strictly a part of the execution before realisation of the money due under the decree, but they certainly arise out of the execution of the decree and are therefore, related to it. The Rule 9 is in Order XXI, which is comprised under the general heading in the Code as "Execution of decrees and orders." When an application under Rule 95 is made in execution of a decree for possession of specific Immovable property, the proceedings then not only relate to the decree but may also affect the decree itself.

75. The divergence of views on this question is not only confined to this Court but there is a singular concurrence in that divergence amongst the various High Courts in India. The question really is a question of procedure and does not affect substantive rights. Strong and cogent arguments may be adduced on either side of the question. The case of *Bhagwati v. Banwari Lal* 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71. is an illustration of this view. Reading the elaborate and learned judgments of Sir J. Stanley and of Mr. Justice Banerji maintaining the different views of the question, there are cogent reasons in support of the conclusions of both these learned Judges. But the question being a question of procedure, I think we should not lightly disturb the view taken by this Court and followed for a long time unless such a view is inconsistent either with the language of the Code or of any authoritative judgment of the Judicial Committee of the Privy Council.

76. The Judicial Committee have strongly insisted upon all questions relating to execution being speedily disposed of u/s 47, C. P. C. *Prosunno Kumar Sanyal v. Kali Dasi Sanyal* 19 C. 683 : 19 I.A. 106 : 6 Sar. P.C.J. 209 : 9 Ind. Dec. 898 .

77. It would be an unprofitable task to discuss all the cases on the point, shall refer to two typical cases on each side so far as our Court is concerned. The view I take is supported by the case of *Earn Narain Sahoo v. Bandi Pershad* 31 C. 737, and the case of *Madhusudan Das v. Gobinda Priya Ghowda-rani* 27 C. 34 : 4 C.W.N. 417 : 14 Ind. Dec, 23. I agree with the reasons given by the learned Judges in those cases.

The contrary view was taken in the case of Sasi bhushan Mookerjee v. Radhanath Bose 19 A. 477 : A.W.N. (1897) 117 : 9 Ind. Dec. 308. This case is important as it deals with both the points on which the answer to this reference depends. The other case is that of Bhi trial Das v. Ganesha Koer 1 C. W. N. 658. Some of the latter cases simply followed this case. In deciding the case of Sasibhushan Mookerjee v. Radhanath Bose 19 A. 477 : A.W.N. (1897) 117 : 9 Ind. Dec. 308. the learned Judges refer to five cases, namely Umakanta Roy v. Dino Nath Sanyal 28 C. 4 : 5 C.W.N. 121.; Kokil Sing v. Edal Singh 31 C. 385. and Hira Lal Ghose v. Chundra Kanto Ghose 26 C.J. 539 : 3 C.W.N. 403 : 13 Ind. Dec. (n. s.) 946.; Nemai Chand. Kanji v. Deno Nath Kanji 2 C.W.N. 691. and Rojoni Kant Bagchi v. Hossain Uddin Ahmed 1 C.W.N. 538. which have taken a contrary view and they refer to three cases. Bhimal Das v. Ganesha Koer 1 C. W. N. 658; Mohomed Mosraf v. Habil Mia 6 C.L.J. 749. and Jagarnath Marwari v. Kartick Nath Pandey (10), which support the view they took. It is quite clear however, from the judgment that the learned Judges really-followed the judgment of Mr. Justice Banerji in the case Bhagwati v. Banwari Lal 1 Ind. Cas. 416 : 31 A. 82 : 5 M.L.T. 185 : 6 A.L.J. 71., I think there is a preponderance of authority in this Court and I do not think that the acceptance of the decision of Mr. Justice Banerji of the Allahabad High Court in any way satisfactorily settled the divergent views in this Court which we are now called upon to settle.

78. The main argument relied on by the learned Judges in deciding as to why a decision in proceedings for delivery of possession cannot be held to decide a question relating to execution, is that "it does not affect the decree in the least". It seems to me that a decision may well relate to execution of a decree although it might not affect the decree itself. The learned Judges, however, do not seem to be quite so strong in this view when they say ""But let us assume that by some stretch of language the order for delivery of possession to the purchaser may be "deemed an order relating to execution of the decree." In these circumstances I think we ought to follow the other decisions of this Court which hold that a decision in proceedings for delivery of possession is a decision of a question relating to execution of the decree.

79. Then as to the second question, that is, as to "whether the question raised is between the parties to the suit". There is no doubt that an auction-purchaser at an auction-sale has a character of his own distinct from that of either a decree-holder or a judgment-debtor. When, therefore, a question arises under Rule 95 of Order XXI of the Code, then it may be well said that the auction-purchaser who is an outsider is not a party to the suit. The third party auction-purchaser was not connected with the decree in any way before his purchase and, therefore, stands on a different footing than either the decree-holder or the judgment-debtor. But in the present case the decree-holder is the auction-purchaser, and the simple question is, does he cease to be a party to the suit after he has made his purchase at the sale held in execution of his decree? So far as this question is concerned, I think there, is a long series of decisions of this Court in which the distinction between the

decree-holder auction-purchaser and a third party auction-purchaser has been well maintained. Bearing in mind the principle that all questions between the parties to the suit should be decided as speedily as possible, it appears to me that all questions as to the nature and extent of the property sold and the mode of delivery of possession of such property, when they arise between the decree-holder auction-purchaser and the judgment-debtor should be disposed of by the Executing Court. When the decree-holder is the auction-purchaser no question of any inconvenience arises for he is a party to the suit, and being the decree-holder who brought the property to sale, he was well aware of the circumstances of the debtors and of the nature of the property which he put up for sale. A third party auction-purchaser is in a disadvantage in that respect and it may not be possible or convenient for him to fight out the judgment debtor in a summary proceeding before the Executing Court. A long series of cases of this Court" have recognised the distinction between a decree-holder auction-purchaser and a third party purchaser.

80. This view finds some support from the judgment of the Judicial Committee in the case of Ganapathy Mudaliar v. Krishna-machariar (8).

81. I would, therefore, answer the question in the affirmative.

N. Rule Chatterjea, J.

82. The result is that the appeal is dismissed with costs---hearing fee, two gold, mohurs in the Full Bench Reference and one gold mohur for the hearing before the Division Bench.