

(1966) 12 BOM CK 0013

Bombay High Court

Case No: Civil Revision Application No. 243 of 1966, (converted from S.A. No. 180 of 1966)
with Civil Application No. 643 of 1966

Kanji Karsandas Thakkar

APPELLANT

Vs

Lala Ambu Patil

RESPONDENT

Date of Decision: Dec. 19, 1966

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 96, 115, 47

Citation: AIR 1968 Bom 98 : (1967) 69 BOMLR 502 : (1967) MhLj 861

Hon'ble Judges: Patel, J

Bench: Single Bench

Advocate: V.V. Divekar, for the Appellant; G.N. Vaidya, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

(1) This is an appeal against an order made under Order 21, Rule 95 of the Civil Procedure Code. The short facts are that a suit was filed by the plaintiff for recovery of his monetary dues from the defendant, being Suit No. 340 of 1952. After a decree was made in that suit, a Darkhast was filed, being Darkhast No. 440 of 1957 for sale of the property. This Darkhast was filed on November 17, 1960. The property was sold in execution proceedings and it was purchased by the plaintiff and the sale was finally confirmed on February 24, 1961. The defendant-appellant took an appeal to the District Court and it was dismissed on January 29, 1962. The present application for possession was filed on January 29, 1965, the trial Court directed possession to be delivered. Then the defendant made an application for recalling of the order on the ground that the present application was barred by limitation. The contention was that the new Limitation Act of 1963 had come into force on January 1, 1964, and the period provided for recovery of possession by a purchaser at an execution sale became absolute. The trial Court held that Article 134 did not apply, but Article 137 applied and confirmed its earlier order. The defendant took an appeal to the District

court but the District Court relying upon the decision in Hargovind Fulchand v. Bhudar Raoji, 26 Bom LR 601 = AIR 1924 Bom 429, held that the appeal was not competent u/s 47. The learned Judge, therefore, dismissed the appeal. Originally, this appeal was filed as an appeal from order, but at the time of the admission, Mr. Divekar got it converted into a second appeal.

(2) Mr. Divekar contends that the matter falls squarely within Section 47 of the CPC and, therefore, a second appeal is competent. Originally, there was a conflict whether or not an auction-purchaser could be regarded as a party to the suit in relation to some disputes which arise between the parties. Some Court held that as he purchases the property in the sale in execution, he may as well be regarded as a party to the suit since he takes the property of the judgment-debtor and if the question arising in the dispute between him and any of the parties related to the execution, discharge or satisfaction of the decree, then it must be decided u/s 47 of the Civil Procedure Code. On the other hand, quite a few other Courts took the view that an auction-purchaser could not be regarded as a representative of the judgment-debtor and as such a party to the suit. By the amendment to Section 47 of the Code, the explanation was added, by which it was provided amongst other things, that a purchaser at a sale in execution of a decree is deemed to be a party to the suit. Mr. Divekar contends that the question in issue now between the parties that is recovery of possession by the auction-purchaser, relates to at least execution of the decree and, therefore, as the auction-purchaser is party under the explanation to Section 47, the order of the trial Court must be regarded as an order u/s 47 and, therefore, appealable as such.

(3) In my view, the contention is not sound. There were several kinds of disputes raised on the entry of an auction-purchaser which could be regarded as relating to the satisfaction, discharge or execution of the decree, and yet could not be tried u/s 47, C. P. Code, because some Courts held that an auction-purchaser could not be regarded as a party to the suit, and it is only, in my view, in order to resolve this conflict that the amendment of the section was brought about. In order, however, that this explanation should apply the disputes between the parties must be such as relate to execution, satisfaction or discharge of the decree. The present dispute as to possession of the property which the auction-purchaser purchased could in no sense be regarded as a matter connected with the execution, discharge or satisfaction of the decree. It is obvious, that, the decree is fully or partly satisfied by the sale of the property, and to that extent the decree is executed. Whether the purchaser obtains possession or not has nothing to do with the judgment-debtor or the decree. Even if there is defect in the title and the purchaser loses the property, effectiveness of execution is not reduced. Obtaining of possession by the purchaser is wholly independent of the execution of the decree. It is something consequential upon his purchasing the property, and there is a current of authority that he has the option either to apply for possession under Order 21, Rule 97 or file a separate suit and claim possession within 12 years before the suit. It is merely an enabling

provision which enables him to apply to the Court for possession of the property. A Full Bench of this Court has in 26 Bom LR 601 = AIR 1924 Bom 429, held that an auction-purchaser, even if he himself is the decree-holder, can sue to recover possession of the property purchased by him at the Court sale, irrespective of the provisions of Section 47 of the Civil Procedure Code. The Full Bench agreed with the reasoning of Mr. Justice Banerji in *Bhagwati v. Banwari Lal*, (1909) ILR 31 All 82, in this connection where the learned Judge said after having given certain reasons:-

"The purchase of the property can, therefore, in no sense be regarded as acquisition of the fruits of the decree, and failure to obtain possession of the property cannot affect the decree itself. Even if the decree be one for sale upon a mortgage, and sale takes place in pursuance of it, delivery of possession to the purchaser is not made under the decree."

The Full Bench overruled the earlier decision of this Court to contrary in *Sadashiv Bin Mahadu v. Naraynan Vithal*, ILR (1911) 35 Bom 452. Mr. Justice Shah also held that though the question could be regarded as between the same parties to the suit, it cannot be said to relate to execution, discharge or satisfaction of the decree.

(4) Mr. Divekar has brought to my attention a decision of the Madras High Court in [Rukkumani Ammal \(died\) and Another Vs. Kamachi Ammal](#), . The Court held that a dispute arising in execution proceedings, between the purchaser in execution of a mortgage decree and the purchaser of the same property in execution of a simple money decree would fall u/s 47 and the order passed appealable. With great respect, it is difficult to accept that every dispute that may arise between an auction-purchaser and a party to the suit must relate to execution, discharge or satisfaction of the decree even assuming without deciding that both auction-purchasers can be regarded as parties to the suit as to which I have my own doubts, for the question is party to which suit. I prefer the reasoning of Hargovind Fulchand's case, 26 Bom LR 601 = AIR 1924 Bom 429, which I am bound to follow. As the amendment by the addition of the explanation to Section 46 of the CPC was not intended to affect the principle of this decision, Mr. Divekar's contention must fail. And second appeal must be held to be incompetent.

(5) Mr. Divekar then prayed that this matter should be treated as an application to revise the trial Court's order and the question of limitation be determined herein. It is true that it is possible in a revisional application to interfere with the decision of the trial Court on the question of limitation though there are conflicting authorities even on this point. However, revisional jurisdiction of the High Court is to be exercised for doing justice and not for upholding technical objections. Here is a case where a suit for money was filed in 1952. The sale of property was finally confirmed in 1962 after ten years. At the time of the sale, the decree holder paid substantial money for purchase of the property. Assuming that the decisions of the trial Court is erroneous, my interference would only mean that there would be undue delay in the plaintiff being able to obtain possession of the property which he has purchased

at the execution sale. So far as this defence to the proceeding. In my view, therefore, I am not called upon to exercise my revisional jurisdiction by any call of Justice.

(6) In the result, the rule will, therefore, stand discharged with costs.

(7) Rule in the civil application is discharged with costs.

(8) Record and proceedings be sent back immediately.

(9) Application dismissed.