(1930) 11 BOM CK 0025

Bombay High Court

Case No: Second Appeal No. 267 of 1929

Navaj Bhavdu Patil		APPELLANT
	Vs	
Totaram Govind Patil		RESPONDENT

Date of Decision: Nov. 20, 1930

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47, 73

Citation: (1931) 33 BOMLR 503

Hon'ble Judges: Patkar, J; Broomfield, J

Bench: Division Bench

Judgement

Patkar, J.
This is second appeal from the order of the District Judge confirming the order of the First Class Subordinate Judge directing rateable distribution u/s 73 of the Civil Procedure Code. [After stating the above-mentioned facts his Lordship proceeded:]

2. In second appeal it is contended, first, that Section 73 of the CPC does not apply to the facts of the present case as no assets were held by the Court and there was only a notional receipt of the purchase-money by the Court Further, it is contended that the decree-holders in darkhasts Nos. 67, 68 and 69 did not apply before the Court passed the order giving the appellant leave to bid and allowing the purchase-money to be set off against the decretal amount. Lastly, it is urged that the sale should be set aside and a re-sale should be ordered.

3. The preliminary question arising in the appeal is whether the order passed by the learned Subordinate Judge was an order passed u/s 47 of the Civil Procedure Code, and whether an appeal to the lower Court and a second appeal to this Court were competent, An order u/s 73 determining a question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall within the purview of Section 47 of the CPC and no appeal and second appeal would lie from such an order. See Balmer Lawrie & Co. V. Jadunath Banerjee ILR

(1914) Cal. 1. If, however, the question determined u/s 73 of the CPC arises not only between the rival decree-holders but also between the judgment-debtor on the one hand and the decree-holders on the other, the order would be within the purview of Section 47 and would be appealable. See Sorabji Coovarji v. Kala Raghunath ILR (1911) 36 Bom. 156, 13 Bom. L.R. 1193. The facts of the latter case are somewhat different. In that case the judgment-debtor paid certain money in satisfaction of the decrees, and the question arose as to the effect of such payment in putting an end to the attachment levied by the decree-holders, and as to whether other decree-holders were entitled to rateable distribution. The judgment-debtor who had made the payment in Court was interested in the decision on the point u/s 73 of the Civil Procedure Code. In the present case the sale was held on December 21, 1926, and the question whether the purchase-money should be rateably distributed between the appellant and the respondents does not in any way affect the judgment-debtor. We think, therefore, that the order passed by the learned Subordinate Judge in this case was not an order falling within Section 47 of the Civil Procedure Code, and neither an appeal to the District Court nor a second appeal to this Court is maintainable.

4. This Court, however, can interfere with the order of the Subordinate Judge in a proper case. The question is whether the lower Court has failed to exercise jurisdiction which was vested in it by law or exercised jurisdiction which did not vest in it within the meaning of Section 115 of the Civil Procedure Code. It is contended on behalf of the appellant that Section 78 does not apply to the facts of the case, because there was only a notional receipt of the purchase-money by the Court and no assets can be said to have been held by the Court within the meaning of Section 78 of the Civil Procedure Code. In Shrinivas v. Radhabai and Manjapa ILR (1882) 6 Bom. 570, where there were competing decree-holders who had applied for execution of their decrees, it was hold that Section 294 of the CPC (Act X of 1877), corresponding to Order XXI, Rule 72, must be taken as subject to the provisions of Section 295, corresponding to Section 73 of the present Code, so that the decree-holder, who has been permitted under the former section to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with such competing decree-holders, and will not be allowed to set off the purchase-money against the amount due to him on his decree. It was held that Section 294, corresponding to Order XXI, Rule 72, for convenience allows the decree-holder ordinarily to set off the purchase-money against his decree instead of paying the money into Court and drawing it out again, and such a notional receipt was held to amount to holding of the assets within the meaning of the section. A similar view was taken in Madden v. Chappani ILR (1887) Mad. 356. The provisions of Order XXI, Rule 72, Clause (2), of the present Code, place the matter beyond any doubt. Clause (2) lays down that--

Where a decree-holder purchases with such permission, the purchase-money and the amount duo on the decree may, subject to the provisions of Section 73, be set

off against one another, and the Court executing the decree shall outer up satisfaction of the decree in whole or in part accordingly.

5. We think, therefore, that Section 73 of the CPC applies to the facts of the present case.

6. With regard to the point that the applications of the rival decree-holders ought to have been made not only before the sale held on December 21, 1926, but also before the application granted on October 29, 1926, it appears that there was a joint application made by the decree-holder with respect to the two darkhasts on December 16, 1926, and even if the appellant''s argument be correct, it appears that the rival decree-holders had applied before December 16, 1926, when the appellant was allowed to set off the purchase-money against the aggregate amount of his decrees on December 18, 1926. It appears to us that the applications of rival decree-holders for execution must be made u/s 73 before the receipt of the assets by the Court, and we think that the assets can only be deemed to have been received by the Court when the sale actually took place on December 21, 1926. The cases cited on behalf of the applicant, AIR 1925 287 (Oudh) and Wali Muhammad v. Abdul Hamid AIR [1926] Nag. 380, have no application to the present case, because it appears that the applications for setting off the purchase-money against the decree were made in those cases after the holding of the sale. We think, therefore, that the argument on behalf of the appellant on this point also fails.

7. The last point urged on behalf of the appellant is that the sale should be set aside and a re-sale should be ordered and reliance has been placed on the decisions in the cases of Shrinivas v. Radhabai and Madden v. Chappani, where the Court allowed the sale to be set aside and ordered a re-sale. Order XXI, Rule 72, Clause (3), enables a judgment-debtor or any other person whose interests are affected by the sale to apply to set aside the sale when the decree-holder purchases without permission. There appears to be no provision in the Code empowering the Court to hold a second, sale on the ground that the decree-holder having applied to set off the purchase-money against the decree, eventually realized that he had to pay out of his own pocket money for rateable distribution to the other decree-holders, a contingency which was not expected by him when he made the application for leave to bid and set off the purchase-money against the decretal amount. Order XXI, Rule 72, Clause (2), contemplates that the application for the setting off of the purchase-money and the decretal amount should be made after the decree-holder purchases the property. A decree-holder having received permission to bid and having been decreed to be the highest bidder, can apply to the Court for permission to set off the decretal amount against the purchase money, and would ordinarily be entitled to an order of set-off if there are no other attaching creditors entitled to rateable distribution u/s 73 of the Code: see Martand Trimbak v. Daya bin Abaji ILR (1919) 44 Bom. 346, 22 Bom. L.R. 106. It appears that the appellant did not make an application to the Subordinate Judge to set aside the sale and order a re-sale even

assuming that he was entitled to that indulgence, On the other hand, the proceedings in the present case disclose that the appellant made an application for possession of the property and that he has been in possession since February 19, 1927. The appellant merely mentioned this point in his memorandum of appeal to the lower Court. In revision we can interfere with the order of the Subordinate Judge, and the plaintiff not having made an application to the Subordinate Judge to sat aside the sale and order a re-sale, it is not necessary in this case having regard to the provisions of Order XXI, Rule 72, to express any opinion as to the correctness of the procedure adopted in the decisions in Shrinivas v. Radhabai and Madden v. Chappani in allowing the decree-holder an option to have the property re sold. We think that in revision there are no sufficient grounds to interfere with the order of the Subordinate Judge.

8. We would, therefore, dismiss this appeal with costs.

Broomfield, J.

9. I agree. The appeal is not competent. It does not appear that the judgment-debtor Totaram is at all affected by this dispute between the rival decree-holders. It cannot be said that there was any question relating to the execution of a decree which comes u/s 47 of the Code; neither is it a case in which interference in revision would be justified. It was held in Sree Krishna Doss v. Chandook Chand ILR (1908) Mad. 331 that a refusal to grant rateable distribution to a party entitled to it may be a ground for interference in revision, but here the Court has allowed and was bound to allow rateable distribution u/s 73 of the Code because the respondents'' applications of December 13, 1926, were made before the receipt of assets by the Court. The case of Madden v. Chappani ILR (1887) Mad. 356 is a clear authority for the proposition that where a decree-holder is given permission to bid and is allowed to set off the amount of his decree against the purchase price, that set-off amounts to the receipt of the assets by the Court within the meaning; of Section 73; but that is only if the sale of the property has already taken place. The Court''s order dated October 29, 1923, in which the appellant''s application for set-off was granted two months before the sale took place, was clearly not a receipt of assets within the section.

10. The only substantial question in the case is whether the appellant should have been allowed an option of having the property re-sold on the authority of Shrinivas v. Radhabai and Manjapa ILR (1882) 6 Bom. 570 and Madden v. Chappani ILR (1887) Mad. 356. There is no provision in the Code under which such an option could be claimed as of right. The trial Court was not asked to set aside the sale. The point was raised in the memorandum of appeal to the District Court, but as th e District Judge''s judgment is silent on the point, it would appear that there also it was not seriously pressed. From the record of the case it appears that the appellant has had possession of the property since the beginning of 1927. These are grounds for holding that this is not a case in which we should interfere by way of revision.

11. I think it is desirable to add that the order of October 29, 1926, that "a set off to the extent of the decretal amount is allowed," is not an order contemplated by the Code and not one which ought to be made. An order for a set-off can only be made under Rule 72, Clause (2), of Order XXI, which says that the order is to be made "where the decree-holder purchases property with the permission of the Court," that is to say, after the sale has taken place. An order of this kind in advance can have no legal effect, for before the sale takes place there is nothing against which a set-off can be allowed, and the decree-holder may after all elect not to bid. It can only be regarded as a sort of undertaking by the Court to make an order for set-off at a future data, an undertaking which it may not be able to carry out if legal claims to rateable distribution should be presented in the meantime. Such an order, therefore, is misleading and liable to lead to complications.