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MANU/BH/0126/1965

Equivalent Citation: AIR1965Pat427

IN THE HIGH COURT OF PATNA
FULL BENCH

A.F.A.O. No. 353 of 1961

Decided On: 03.05.1965

Appellants:**Awadh Bihari Tewari and Ors.**
Vs.
Respondent:**Sudarsan Rai and Ors.**

Hon'ble Judges/Coram:
Udai Sinha , H. Mahapatra and A.B.N. Sinha , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Kailash Ray and Sheo Kumar Singh, Advs.

For Respondents/Defendant: Chandra Bhushan Sahay and Rama Raman, Advs.

JUDGMENT

H. Mahapatra, J.

1. The facts leading to this miscellaneous second appeal may be stated in brief as follows. In 1953, respondent No. 2, Maharaja Kumar of Dumraon, filed a suit for rent (suit No. 452 of 1953) against three persons: Mt. Sonmukha Kuer (mother of the present respondent No. 1 Sudarsan Rai), Vijayee Tewari (respondent No. 3) and Ghuran Rai (respondent No. 4). Mt. Sonmukha Kuer died during the suit, but in spite of that, the suit was decreed against the three defendants, including herself. There was no substitution of her legal representatives in the suit after her death. An execution was levied on the decree, Execution Case No. 368 of 1954, against three judgment-debtors and in that proceeding, an auction sale was held on the 20th January, 1955, of the property involved in the present proceeding and the decree-holder, respondent No. 2, purchased that. The sale was confirmed on the 22nd of February, 1955, and sometime thereafter, the auction purchaser reportedly took possession of the property.

Mt. Sonmukha Kuer's son Sudarsan Rai made an application tinder Section 47 and under Order 21 Rule 90 of the Code of Civil Procedure in the executing court, on the 18th of August 1958, to set aside the sale, mainly, on the grounds that the decree passed in the rent suit was a nullity, inasmuch as his mother, who was one of the defendants, had died during the pendency of the suit and before the decree, without being substituted by the legal representative; and that processes of the court, in the execution case, were fraudulently reported to have been served upon her, and as such, there was a fraud practised in the proclamation and conduct of the sale. He alleged that he came to know of the sale on the 10th of August, 1958. A week before this application was filed in court, the auction-purchaser (respondent No. 2) had sold the said property to two persons, who are the present appellants in this appeal, Awadh Behari Tewari and Swaminath Tewari, on the 11th of August, 1958, by a registered instrument. The transferees opposed the application of Sudarsan Rai, but the sale was set aside by the Executing Court on the 30th of July, 1960. Against that,

an appeal was taken by the two transferees from the auction-purchaser but that failed on the 30th of September, 1961, by the orders passed by the first Additional Subordinate Judge, Arrah. The present appeal is directed against that.

2. For the appellants, it was contended that Sudarsan Rai was not a representative of a person who was a party to the suit, because, on the death of Mt. Sonmukha Kuer, the suit had abated against her and she was not to be deemed to be a party to the suit. Section 47 of the Code of Civil Procedure permits one who was a party to the suit or who is representative of such a party, to ask the Executing Court to determine any question that may arise between him and another person who was either a party to the suit or his representative. The section reads as follows:

> "(1) 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.
>
> (2) The Court may, subject to any objection as to the limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.
>
> (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.
>
> Explanation:-- For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit."

3. Rule 4 of Order 22 of the Code of Civil Procedure (to be referred hereafter as the Code, for brevity) provides that where one of two or more defendants dies and the right to sue does not survive against the surviving defendants alone, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit, but, where, within the time limited by law, no such application is made, the suit shall abate as against the decreed defendant. Learned counsel urged that when a suit abates, it is completely destroyed as far as the deceased is concerned and it will be deemed as if there was no suit brought against him or her. I am afraid, this is not the correct leaning of abatement of the suit. In Words and Phrases, Permanent Edition, Volume I, page 65, "abatement"' has been defined as "a suspension of proceedings in a suit for the want of proper parties capable of proceeding therein." This definition has been culled from two reported decisions mentioned in that book. The effect of an abatement, if it is not set aside under Rule 9 of Order 22 of the Code, is virtually a decree and the order of abatement is considered to have determined the rights between the parties and it operates as a decree in favour of the deceased defendant. That decree becomes final, as a result of abatement see Bhikaji v. Purshotam ILR 10 Bom 220; Naimuddin v. Maniruddin, 32 Cal WN 299 (302): (MANU/WB/0068/1927 : AIR 1928 Cal 184 (185)): Rahimunissa Begam v. Srinivasa Aiyangar, 38 Mad LJ 266: (AIR 1920 Mad 580).

Rule 9(1) of Order 22 provides that where a suit abates, no fresh suit shall be brought on the same cause of action. This provision is similar to that under Rule 9 of Order 9, Rule 2(2) of Order 2 and Rule 1 of Order 23. This position clearly indicates

that the legislature equated an abatement of a suit with its dismissal, so far as the deceased person is concerned. On the death of a defendant, he does not cease to have been a party to the suit. In a case where the Court finds that a particular defendant is not a proper party and strikes off his name from the suit, or where the plaintiff asks for expunging his name from the plaint for some reason, a person so removed From the proceedings of the suit will be deemed as if, against him, no suit was instituted. In that sense, he is not a party to the suit at any stage see Manakchand v. Manoharlal, MANU/PR/0044/1943 : AIR 1944 PC 46; Mt Kusmi v. Sadasi Mahto, AIR 1942 Pat 432 and Suresh Mohan Thakur v. Shamal Mall Bubna, MANU/BH/0129/1957 : AIR 1957 Pat 437.

But, if a suit is dismissed against a defendant for any reason, in the decree or at any time earlier than the decree was passed, such person can come within the explanation given under Section 47. The abatement of a suit being of a nature of dismissal, the person concerned can also, in that view, be covered under that explanation. If a suit abates as far as a deceased plaintiff is concerned, the position will be the same and his representative can come within the meaning of Section 47. In that view, Mt. Sonmukha Kuer was a party to the suit till its abatement occurred against her. If her legal representative would have been substituted, he would have become a party to the suit. But without such substitution, he can still be called a representative of a person who was a party to the suit, and in that capacity, he is competent to maintain an application under Section 47 of the Code, if it is in respect of execution, discharge or satisfaction of the decree.

4. From the language of the section, it is clear that the governing factor is whether the disputant was a party to the suit and not whether he was a party to the decree, although the dispute arises during the execution of the decree. It is further significant that the section uses the word "representative" instead of "legal representative." These distinctions are very significant and brings out clearly the wider range of persons who can avail themselves of this provision.

5 . Learned Counsel very much relied upon the case of Mahabir Singh v. Narain Tewari, MANU/UP/0058/1931 : AIR 1931 All 490 (FB). The relevant facts were that ir 1907, one Sheo Nath executed a mortgage in favour of Mahabir Singh. In 1915, he sold a part of that mortgaged property to one Shri Bhagwat. After the death of Sheo Nath, Mahabir brought a mortgage suit against his son Chandi and his transferee Shri Bhagwat and obtained a preliminary decree for sale of the mortgaged property against both of them, on the 22nd of December 1920. Bhagwat died after that, leaving three sons but he was not substituted by them in the suit. The Court had passed an order that the suit had abated against Bhagwat. After that, in 1924 a final decree against Chandi alone was passed and the property directed to be sold was the entire mortgage security including the portion which had been sold by the mortgagor Sheo Nath to Bhagwat. This decree was put into execution and in that proceedings, Bhagwat's three sons raised objections against the execution of the decree, under Section 47 of the Code, on the ground that their father was not a party to the decree and their property was not liable for sale in execution of that decree. Mahabir Singh, the decree holder, opposed this application and maintained that Section 47 was not applicable and the objectors' remedy, if any, was by a separate suit.

The executing Court dismissed the application under Section 47. Following that, a suit was filed by the three sons of Bhagwat on the 16th of July, 1926, but in that, Mahabir Singh, as a defendant, resiled from his previous stand and pleaded that Section 47 was a bar to that suit. This was upheld and the suit was dismissed both by

the trial Court and the first Court of appeal. A learned Single Judge of the Allahabad High Court, who heard the appeal against that, observed that as the result of the abatement of the suit against a particular party, that party is put in the same position as if he had never been made a party to the suit. The second appeal was allowed and the suit remanded for disposal. A Letters Patent Appeal arose out of that judgment and ultimately, it was referred to a Full Bench. Sulaiman, C.J. relying upon three decisions of the Judicial Committee Radha Prasad Singh v. Lal Sahib Rai, 17 Ind App 150 (PC); Khiarajmal v. Daim, 32 Ind App 23 (PC); Rashiunnissa v. Muhammad Ismail Khan, 36 Ind App 168 (PC) an earlier decision of that Court Beni Prasad Kunwar v. Mukhtesar Rai, ILR 21 All 316 and a case of the Madras High Court Nallaperumal Pillai v. Hamed Maracayar, MANU/TN/0261/1927 : AIR 1928 Mad 276 took the view that if a defendant dies during the pendency of a suit and his heirs are not brought on the record and the decree is passed behind his back, his heirs are not bound to intervene in the execution department because their ancestor ceased to be a party to the suit:

The mere fact that he was a party at one time would not affect the decree came to be passed: the position* as regards the suit which has abated is almost the same as if the deceased had not been impleaded. He discountenanced another earlier decision of that Court in Imdad Ali v. Jagan Lal ILR 17 All 478 where, in such a case, proceedings under Section 244 of Act X of 1877 (corresponding to the present Section 47 of the Code) were held maintainable at the instance of the heir of a defendant who had died before the decree without being substituted by her legal representatives. The view taken by the learned Chief Justice no doubt supports the contention raised before us on behalf of the appellants. But, with great respect, I am unable to find any justification for that view, on the unambiguous meaning of the language employed in Section 47. At one place in the judgment, the learned Chief Justice observed:

> "So far as I am concerned, I would be inclined to hold that the use of the present participle 'arising' indicates that the person should be either a party to the suit or a representative of the party to the suit 'at the time' (underlined (here into ' ') is mine) when the question is raised."

The questions to be determined under Section 47 are bound to be related only to the execution, discharge or satisfaction of the decree and necessarily, therefore, must be during the execution proceeding, which is a continuation of the suit. What the learned Chief Justice said will mean that the eligibility for Section 47 will depend upon a person being a party to the suit at that stage. If it were so, there will be no room for the representative of such a person to come. If his representative is already substituted, then he is a party and not a representative. If not substituted and the suit has abated against his predecessor-in-interest, he cannot come within Section 47 according to the view of the learned Chief Justice. Thus, the inclusion of the representatives of the parties to the suit, in the section, will become thoroughly purposeless. This, in my opinion, is a strong reason against acceding to the view taken in the Allahabad case. The learned Chief Justice, at another place in the judgment, equated the position of a defendant whose name is struck off from the record with another against whom a suit is withdrawn or abandoned. Both of them, according to him, are like, on the same footing, as a stranger to the litigation. A party who is expunged from the suit and whose name is struck off is, no doubt, to be deemed as one who was not involved in the suit at all. His rights, in relation to other parties of the suit, are not taken as determined at all: the suit does not stand dismissed as far as he is concerned. He is thus in a position entirely different from

another against whom the suit abates or dismissed.

6. I should now refer to the decision of the Judicial Committee on which reliance was placed in the Full Bench case of the Allahabad High Court and also by learned counsel for the appellants before us. In the case of 17 Ind App 150: ILR 13 All 53(PC) a preliminary decree, in a suit for possession and mesne profits, was passed in 1856, against defendants including one Jhanguri. None of the defendants, however, were, by that decree, made judgment-debtors for mesne profits, in the sense that their property could be attached by virtue of it. That preliminary decree only found that the defendants in suit were accountable for mesne profits and by that finding they were bound, but it did not ascertain the amount of such profits or determine the important question whether the defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of those matters until March 1877, when, for the first time, a money decree was passed in that suit (final decree as commonly called) which was capable of being put into execution. Jhanguri had died before that. His son or his grandsons were not made parties to the suit, in place of Jhanguri.

When the plaintiff-decree-holders of that suit executed the decree in the court at Ghazipur and brought properties, belonging to Jhanguri, to sale, Jhanguri's grandsons (their father, son of Jhanguri having died) lodged objections praying for release of their interest, on the ground that it belonged to them and they were in possession thereof and the judgment-debtors had no concern with that. Those objections were repelled by the Subordinate Judge of Ghazipur on the 10th March, 1881, as such objections had already been rejected once before in the court of the Subordinate Judge at Shahabad, where another execution of the same decree had been levied in respect of properties situate in that district. Thereafter, a suit was instituted by the grandsons of Jhanguri on the 3rd March, 1882, which found its way to the Judicial Committee ultimately. They claimed that their properties were not liable under the final decree for mesne profits, as their predecessor-in-interest was not a party thereto. The case had a chequered career being remitted twice by the High Court to the Court of first instance. The High Court finally decreed the suit with costs. Against that, the defendants, in respect of mesne profits, appealed to the Judicial Committee. Their Lordships, dismissing that appeal, held that an operative decree, as the final decree in the suit, for mesne profits was obtained, after the death of a defendant, by which the extent and quality of his liability already declared in general terms (in the preliminary decree) were for the first time ascertained, could not bind the representatives of the deceased, unless they were made parties to the suit, in which it was pronounced.

The judgment of the High Court was upheld. Nowhere in the decision there was any reference to Section 244 of the Civil Procedure Code, as it was then (Act X of 1877) or any consideration whether that was a bar to the maintainability of the suit by the representatives of Jhanguri, who had died before the final decree. On the other hand, it is clear from the judgment that the claims of the plaintiffs, as they had raised in the proceeding before the Subordinate Judge, for release of their interest from the execution were rejected and thereafter, they filed the suit. Their objections, in the execution case, may have been under provisions, like Order 21 Rule 58 of the present Code. The prayer "for release of their interest" indicates to me such a position. In any case, that decision cannot be used as an authority for the proposition that persons, like the grandsons of Jhanguri, who had not been substituted in the suit, before the final decree for mesne profits, on the death of their predecessor-in-interest, who was a party to the suit, could not be deemed as representatives of a party to the suit, for

the purpose of Section 47.

7. I equally find the case of 32 Ind App 23: ILR 32 Cal 296 (PC) not helpful on the point. Six persons, belonging to a Muhammadan family, executed two usufructuary mortgages, on the 15th of May, 1874, one in favour of two persons and the other in favour of those two and a third person. On the 4th of June 1878, two other usufructuary mortgages were executed by the previous mortgagors in favour of the two of the previous mortgagees, in satisfaction of the previous mortgages. On the 21st of May, 1878, the two mortgagees obtained a money decree against, among others, a minor legal representative of one of the previous mortgagors by compromise, and in execution thereof, the property was purchased by the mortgagees, benamdar. On the 1st of May, 1879, the other usufructuary mortgagee in respect of the first mortgage of 1874, brought a money suit, in respect of his share of the debt, and the defendants included a minor legal representative of one of the mortgagors. There was a reference to arbitration in the suit by all parties except two defendants, who were ordered to be expunged from the record, but, the award was passed against all the original defendants including the minor and those two defendants and on that basis, the decree was passed, in execution whereof, Immovable properties were purchased by a third party auction-purchaser.

In 1894 the mortgagors asked for redemption of the two mortgages dated the 4th of June, 1874, and on being refused, they instituted a suit for that purpose, on the 11th of January, 1897. The plea, in defence, was that those mortgages had already been discharged by the two previous suits, instituted by the mortgagees and the auction sale held in execution proceedings, arising from those two suits. The defendants claimed that they were in possession as bona fide purchasers in court sale and not as mortgagees and the plaintiffs had no right of redemption. There was amendment of the plaint and further defence, including limitation. The trial court dismissed the suit for redemption but the High Court allowed it, against which, the defendants went in appeal to the Judicial Committee. On facts, it was found that the minor legal representative of one of the original mortgagors was not properly represented in the two previous suits, in which the mortgaged properties were brought to sale in execution of money decrees. Similarly, the two defendants who had been struck off from the records in that suit, in which a reference to arbitration was made were held not to be affected, either by the award or the decree passed thereupon. On those findings, their Lordships held:

> ''It was not, therefore, the case of an erroneous decision, ruling, or exercise of discretion of the Judge in a matter in which the Court had jurisdiction. Their Lordships think that the estate of Naurez (the deceased mortgagor) was not represented in law or in fact in either of the suits, and the sale of his property was, therefore, without jurisdiction and null and void. Nor can they hold that the share of Amirbaksh (minor legal representative of Naurez) himself, in his father's estate, was bound. In the opinion of their Lordships, it is not a mere question of form but one of substance. In coming to this conclusion their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale, but in the present case the real purchaser was the judgment-creditor, who must be held to have had notice of all the facts. Sinner and Kadurbaksh (the two defendants who were not parties to the reference to arbitration) never signed the agreement for reference to Kodumal in suit No. 372 of 1879, and the Court was asked to strike their names out of the record. They were not, therefore, parties to any of the subsequent proceedings which were founded exclusively on the

agreement, and it is immaterial whether their names were actually removed from the record or not."

Their shares, therefore, did not pass by the sale in that suit. The Judicial Committee upheld the right of the plaintiffs to redeem the mortgage. This decision only lays down the proposition that a Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record: as against such persons, the decrees and sales are void, without any proceedings to set them aside. This has no bearing OH the question as to who are competent to seek the application of the provisions under Section 47 of the Code without recourse to a separate suit.

8. The other Privy Council case is 36 Ind App 168 (PC). There, Muhammad Sardar Khan, the father of the plaintiff appellant before the Judicial Committee ana Mauladad Khan were two brothers. When the former died in May 1888, he was possessed of the half share in the properties and left, us his heirs, one adult daughter by his first wife, another daughter, the appellant who was then only four years old by his second wife and his brother Mauladad Khan. He was indebted to one Fateh Chand under a decree of 1882, to Achal Das under a bond of 1882, to Sant Lal and Moti Lal under a decree of 1883 and to his brother Mauladad Khan under a possessory mortgage deed of 1886. Soon after his death, his brother Mauladad Khan purchased, in the name of his four sons, in April 1889, the decree held by Sant Lal and Moti Lal and in June 1899, he purchased, in his own name, the decree held by Fateh Chand. He also purchased, in the name of his four sons, in April 1889, the claim of Achal Das. Mauladad Khan died in July 1893, but, by that time, he had got into his own hands all the existing claims against Sardar Khan's estate.

In April 1891, he had applied for execution of Fateh Chand's decree and impleaded Mt. Rashin Unnisa (minor daughter of Sardar Khan) under the guardianship of her sister. In May 1891, he also brought under execution the decree of Sant Lal and Moti Lal, in the name of his four sons, as assigns of the decree-holders, and impleaded the minor daughter of Sardar Khan as judgment-debtor under the guardianship of himself, Mauladad Khan. In both those cases, properties were brought to sale and the decree-holders became the auction-purchasers. In May 1891 Mauladad had also brought a suit to recover interest on the mortgage, which he himself held from Sardar Khan and in the plaint, the minor daughter was impleaded under the guardianship of her sister. After his (Mauladad's) death, his four sons put the bond of Achal Das in suit and obtained an ex parte decree in August 1894. In that case, the minor daughter was put under the guardianship oÂ£ her elder sister. Mauladad's fourth son, Niaz Muhammad Khan, married the minor daughter of Sardar Khan and he, as the next friend and guardian of his wife Rashid-un-nisa, who was a minor of 14 years, commenced a suit, in September 1898, with the object to obtain a declaration that the two decrees and three sales in execution affecting her share, in her father's estate, were invalid as against the plaintiff, who was a minor and not legally represented in the proceedings from which they resulted.

The trial Court found that the minor plaintiff was not legally and properly represented in the two suits commenced after the death of her rather, and in the two execution cases, levied on the two decrees obtained against her father. The plaintiff's suit was decreed, but the High Court on appeal took the view that the impeached transactions were proceedings in execution of those decrees, and that being so, the proper course for the plaintiff was to raise her objections to the execution of those decrees, under the provisions of Section 244 of the Code of Civil Procedure and not by a separate

suit. In that view, the suit was dismissed. Against that, the plaintiff came in appeal to the Privy Council, who restored the trial Court's judgment, by decreeing the plaintiff's suit. They were of opinion that as the plaintiff-appellant was never a party to any of the suits, in the proper sense of the term, as she was a minor and was not represented properly and legally, Section 244 had no application and her suit was, therefore, maintainable. The reason is obvious.

Two decrees had been obtained against her father during his lifetime. She could not have objected to their execution after his death. In the execution cases relating to those two decrees, though she was named as a judgment-debtor; she was not properly represented, and in that sense she was not a party to the execution cases. In that view, the sale held in those two cases, in respect of her share in the property, was without any jurisdiction of the Court concerned. The two suits that were instituted to enforce the other two debts of her father resulted in decrees, and though her name was shown as a party thereto, she having not been represented by a proper legal guardian, those decrees were, in effect, nullity as far as her snare was concerned. But, as she was not deemed a party to the suit, she could not have come under Section 244, to dispute the executability of those decrees. In the former two cases, the sales and in the latter two, the decrees were nullities and in all of them, she was not deemed a party. Thus, the facts of that case are clearly distinguishable from the case before us.

9. I am compelled to the view that none of the Privy Council cases, referred in the Full Bench decision of the Allahabad High Court, support the view that the person, raising any question under Section 47, must be a party to the suit on the date when the question arises. I do not find any warrant for that either in the language of the section or from any sense of justice. My conclusion is that the representative of a person who was a party to a suit but died before the decree, without being substituted by his legal representatives, is competent to raise the relevant questions about the execution, discharge and satisfaction of the decree, under Section 47.

10. Learned Counsel next contended that the suit having abated against Mt. Sonmukha Kuer, on her death, the decree passed subsequently against her was a nullity, as far as her interests were concerned. The decree was, therefore, a money and not a rent decree. What could be sold in execution of that decree was only the right, title and interest of the other two tenant-judgment-debtors and not the entire holding. When a decree is a nullity, there cannot be any question of its execution, discharge or satisfaction. No legal proceeding is necessary to set aside such a decree which, in law, does not exist or is operative. In that view Section 47, according to learned counsel, will not apply in regard to a void decree.

The first part of the argument is unassailable, that is, the decree passed, in the present case, was a nullity so far as Mt. Sonmukha Kuer's share in the holding was concerned and it did not affect in any way her legal representative. The sale in execution of that decree did not touch her interest and the auction-purchaser and his transferees, the present two appellants, did not acquire any title in respect of or share in holding. But the other part of the argument that this question cannot be gone into in a proceeding under Section 47 cannot be accepted. A question about the executability of a decree is a question relating to the execution of that decree. In spite of a decree being null and void for some reason, if it is put into execution, a party to the suit in which the decree was passed or his representative, must have a chance, in the execution case, to raise objections against the executability of that decree either in whole or in part. The scope of Section 47 is wide enough and in the

words of Lord Macnaghten Prosanno Coomar Sanyal v. Kasi Das Sanyal, 19 Ind App 166 (PC):

> "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible."

There should be a liberal construction of the language in the Section, so that all questions capable of determination by the Executing Court may be brought before it and the parties should not be driven to the worries and expenses of an independent suit, unless the case is clearly outside the scope and purview of Section 47. The Executing Court has been given exclusive jurisdiction under this section, as to all matters relating to the execution of a decree and as a general rule, a separate suit has been barred. Where the interests of any person, who was not a party to the suit or his representative, get involved in the question that comes before a Court under Section 47, the proceeding can be converted into a suit as provided in Subsection (2) and all relevant matters will be decided in that suit. These are clear indications of the wide scope of the section.

The view taken in the previously referred Full Bench decision of the Allahabad High Court is that where a decree is without jurisdiction or is otherwise utterly null and void, and can therefore be ignored by a person, his protest is not merely as to its execution but he impeaches the decree itself and such a dispute is not within the purview of Section 47 at all. This view is contrary to the current of authorities in this country. Finally, this question appears to have been settled, in the case of Hira Lal Patni v. Kali Nath, MANU/SC/0041/1961 : AIR 1962 SC 199: (1961) 2 SCJ 592 There, a decree was passed on the original side of the Bombay High Court on an arbitration award. It was transferred to a Civil Court in Agra for execution. In that proceeding, an application under Sections 47 and 151 of the Code was filed on the ground that the Bombay High Court had no jurisdiction to pass the decree in that case, and, therefore, the decree was a nullity. While holding that when the plaint was filed in the Bombay High Court after obtaining the necessary leave from the Court under Clause 12 of the Letters Patent, there was no inherent lack of jurisdiction of that Court to pass the decree, their Lordships observed:

> "The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it."

11. In the case of Jungli Lall v. Laddu Ram Marwari 4 PLJ 240: (AIR 1919 Pat 430) a Full Bench of this Court, as early as 1919, considered the question whether it is open to the representatives of a judgment debtor to object to execution of a decree on the ground that the judgment-debtor was dead at the time the decree was made against him, and that the decree was, therefore, a nullity, and answered that in the affirmative. An argument which was raised but repelled by their Lordships was that though a decree passed against a dead man is a nullity, the executing Court cannot take notice of this defect and is bound to execute the order contained in the decree, the only remedy open to the objectors being by (sic) a judgment-debtor died after the preliminary decree but before the final decree was passed in a mortgage suit.

During execution of that decree, an objection was raised by the representatives of the deceased defendant. Dawson Miller, C.J. observed that a decree which is void can be treated as non-existent and of no binding force or effect; that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal.

In the latter case the executing court is not competent to make such a declaration; in the former case neither the executing court nor any other tribunal is bound to take notice of that which is a nullity although it may take the form of a decree........In the present case it is not disputed that the appellants were the representatives of a person who was a party to the suit. They were so treated by the respondents who made them parties to the execution proceedings in their representative capacity, and as such they were competent to take proper objection to the execution of the decree before the executing court, and if my view, expressed above, is right, that court was bound to hear the objection." Manuk, J. in his judgment in that case referred to a large number of decisions and answered the question of reference in the same way as the learned Chief Justice did.

The other learned Judge Coutts, J. also gave a judgment to the same effect. (I should like to point out here that at p. 245 (of Pat LJ): (at p. 432 of AIR) of the report, the learned Chief Justice, after holding that the hearing contemplated in Order 22 Rule 6 of the Code was a final hearing which had necessarily to take place before a decree capable of execution, that is, final decree, could be passed, observed that the defendant Raghu Lal did not die between the conclusion of the hearing and the pronouncement of judgment and that when the judgment was pronounced and a decree passed against him, the suit as against him had long abated. This view about the abatement of the suit in the case of a party who died after the preliminary decree but before the final decree in a mortgage suit was taken exception to in the aforesaid Full Bench case of the Allahabad High Court. That observation of the learned Chief Justice of this court, in that case, was to repel the argument against the nullity of the decree on the basis of Rule 6 of Order 22 of the Code, and it had nothing to do with the ultimate decision on the question of reference about the maintainability of objection in regard to the executability of a void decree in an execution proceeding by a representative of a party who died before the final and operative decree is passed in the suit.

That decision has been consistently followed by this Court in the cases of Jamila Khatoon v. Dayanand Thakur (MANU/BH/0081/1928 : AIR 1928 Pat 272); Tika Ram v. Tula Ram, AIR 1930 Pat 480; Bhagirath Prasad v. Jamuna Devi, MANU/BH/0051/1950 : AIR 1950 Pat 211 and Nanda Gopal v. Baidyanath Dutt, MANU/BH/0026/1957 : AIR 1957 Pat 87. In many other cases also that view has been acted upon indirectly but it is not necessary to refer to them here. In the case of Dadu Raghu Patil v. Tukaram Ranaba Dhere, MANU/MH/0067/1959 : AIR 1959 Bom 221 the same view was taken to the effect that the question of nullity of a decree can be raised under Section 47. A reason given in that judgment has appealed to me considerably. The learned Judges said that if such a void decree is executed without such objection that will operate as res judicata in a subsequent suit. In that case, a decree was passed against a defendant though he had died before. In execution of that decree, properties were sold. A suit was filed on the ground that the decree in the previous suit was a nullity. That was held to be barred under Section 47 of the Code. A Full Bench decision of the Calcutta High Court in the case of Gora Chand Haldar v. Prafulla Kumar, MANU/WB/0059/1925 : AIR 1925 Cal 907 (FB) and a Full Bench, in the case of Ram Narain v. Lala Suraj Narain, MANU/OU/0183/1933 : AIR 1934 Oudh 75 (FB) have taken a similar view.

The supreme Court decision, which I have already referred, shall be taken as the final view and it is not necessary to refer to other cases, in that connection, as cited by both the parties. The view taken in the case of 4 Pat LI 240: (AIR 1919 Pat 480) (FB) stands affirmed by the view expressed by the Supreme Court. The decision of the Full Bench of the Allahabad High Court in the case of MANU/UP/0058/1931 : AIR 1931 Al 490 (FB) cannot hold the field. A decree is void if the Court passing it lacks jurisdiction, territorial, pecuniary, or in regard to the person of the judgment-debtor. It is so void when it is passed against a person who was not a party at all to the suit or who was a party but died without substitution of his legal representatives before the conclusion of the hearing of the suit. When such a decree is put into execution such a party or his representative can raise objection against the executability of that decree under Section 47.

12. There is one more question to be considered in this appeal. The respondent Sudarsan Rai also applied in the executing Court under Order 21 Rule 90 of the Code to set aside the sale. He successfully proved that processes in the execution case, in respect of publication and conduct of sale, were allegedly served on Sonmukha Kuer though she had died long before. The Court of first instance has found that there was palpable fraud practised in publishing and conducting the sale. For the appellants, it was urged that the two prayers under Section 47 and Rule 90 of Order 21 could not be joined together in the same application. A similar objection was taken but rejected in ILR 7 Pat 331: (MANU/BH/0081/1928 : AIR 1928 Pat 272). We need not be detained on this point.

13. The other contention of the appellants was that rule 90 could not be invoiced by the applicant because his interests were not affected by the sale, inasmuch as the decree which was being executed was a nullity, so far as his interests were concerned. The grounds on which a court-sale can be set aside under this rule are restrictive. They are confined to material irregularity or fraud in publishing and conducting the sale accompanied by substantial injury to the applicant by reason of such irregularity or fraud. Irregularity or fraud does not make the sale void but only voidable and at the instance of the party affected by such sale, it can be set aside; if not challenged, the voidable sale continues to be valid and a good title is conveyed to the auction-purchaser. Other kinds of irregularity or fraud cannot be raised in an application under this rule. Apart from the grounds that may be raised against the sale, a person who can raise such grounds must be one who is a decree-holder or is entitled to a share in the rateable distribution of assets or whose interests are affected by the sale. The respondent No. 1, if at all, can come under the last clause. Previous to 1928, the provision under this rule in the Code included "any person whose Immovable property has been sold". That was substituted by "any person whose interests are affected by the sale". This change opened the door to objectors of other kinds, such as mortgagee, lessee and the like. The word "interests' is of wider significance and includes proprietary, possessory and pecuniary. In the present case, the applicant's possessory interests, if at all, might have been affected by the sale, if he was dispossessed at the time of delivery of possession of the property to the auction-purchaser.

In his application, he stated that he still continued his possession as before, after the death of his mother. No other kind of his interests was affected by the sale, as the sale was without jurisdiction, so far as his interests were concerned, for the reason that he was not a party in the execution proceeding, and also for further reason that the decree, on which execution was levied, was a nullity, so far as interests of his mother and his were concerned. In such circumstances, it is not possible to hold that

he can come within the purview of Rule 90, as a person whose interests were affected by the sale. If we compare the language of Rule 89, we can find the difference that the Legislature kept between the two rules. There, any person holding any interest in the property sold can apply to have the sale set aside, on deposit, in Court, money for payment to the auction-purchaser and the decree-holder. Though his interest may not be affected in land by the sale, he can still put an end to all disputes by paying off the decree-holder and the auction-purchaser interest may not be affected in land by the sale, and avoiding the sale. But in Rule 90 the scope is more restrictive than in the previous rule. Unless a person's interests, be it proprietary, possessory or pecuniary, are affected by the sale, he cannot come, on the ground of material irregularity or fraud in publishing and conducting the sale to annul it.

14. Learned Counsel for the respondent cited the case of Bachoo Prasad Singh v. Gobardhan Das, MANU/BH/0070/1939 : AIR 1940 Pat 62. There a sale of the entire joint family property in execution of a decree was found to be without jurisdiction, as against the share of three minor members, who were not properly represented in the execution proceedings. The minors objected to the sale under Order 21 Rule 90 before the sale was confirmed. Notices under Rule 22 of Order 21 were held not to have been properly served on the minors. Learned counsel, (sic) on the sale was void as against the minors' interests, it was still set aside, at their instance, by an application under Rule 90. Notice under Rule 22 is to show cause against execution and in absence of such notice in that case the executing Court suffered from the lack of jurisdiction in carrying on the execution of the decree, and in that view, the sale was set aside. I should like to point out that material irregularity or fraud in publishing and conducting the sale, which alone could be the basis for setting aside a sale under Rule 90, does not appear to have been raised, in that case. The maintainability of an application under Rule 90 was also not mooted in that case. In that view, that decision cannot be urged in support of an application under Rule 90 by a person whose interests were not affected by a sale held without jurisdiction of the Court; in other words, by a void sale.

15. I would like to refer to the case of Mrinmayee Ray v. Sreepati Charan Das, MANU/BH/0156/1945 : AIR 1946 Pat 133 where, a co-sharer landlord obtained a decree for rent against several judgment-debtors, one of whom died before execution, but after the decree. The legal representatives of the deceased were not brought on the record in the execution proceedings. They applied to set aside the sale under Rule 90. The learned Judge held that as the sale was void to the extent of the deceased judgment-debtor's interests were not affected by the sale, could not apply under Rule 90.

16. A Bench decision of the Calcutta High Court in the case of Rampada Nag v. Kanai Rai. MANU/WB/0432/1926 : AIR 1926 Cal 1219 took a similar view. There, one of the several tenants against whom a rent decree was obtained was dead and the sale, in execution of that decree, was held, without substituting the heirs of the deceased. The sale was valid as to the shares of the surviving judgment-debtors but the interests of the deceased was not affected, and therefore, his heirs were not entitled to apply for setting aside the sale under Rule 90.

17. In the case of ILR 7 Pat 331: (MANU/BH/0081/1928 : AIR 1928 Pat 272) the decree was passed against the father of the appellants together with other judgment-debtors and the appellant's property was put up for sale, in execution of that decree, and sold to a third person. The appellants filed an application under Section 47 and Order 21 Rule 90 of the Code, seeking to have the sale set aside. They alleged nullity

of the decree as well as material irregularities in connection with the proclamation and conduct of the sale, in their support. The latter plea was rejected by the executing Court, on evidence. A Division Bench of this Court did not interfere with that part of the executing Court's order, though they remanded the case for an enquiry into the objections under Section 47, about the nullity of the decree, opining, at the same time, that a prayer under Section 47 could be joined with a prayer under Order 21 Rule 90. Neither the executing Court nor the High Court considered the question of maintainability of an application under Rule 90 in a case of it void decree or sale which could not affect the interests of the applicant. Similar was the position in the case of Bhan Kumar Chand v. Lachmi Kanta Rai AIR 1941 Pat 566. I am, therefore, clearly of the view that the son of Mt. Sonmukha Kuer, respondent No. 1, was not entitled to maintain his application under Order 21 Rule 90.

18. It is now to be seen whether, in the present case, the whole sale should be set aside or it will be enough to say that both the decree and the sale were null and void, so far as the interests of Sonmukha Kuer or her son Sudarsan Rai are concerned. Learned Counsel for the respondent No. 1 cited several cases before us to contend that as the sale was a composite one, it should be set aside as a whole, although all the judgment-debtors did not join in the application. There can be no dispute that in an appropriate case even though all judgment-debtors do not apply for setting aside the sale, it can be annulled at the instance of some, if there is a valid ground for that purpose. It may be done under Section 47 or Rule 90 of Order 21. The three defendants who were joined to the rent suit in the instant case did not belong to the same family. They were three different persons and possibly of different castes. In that view, they were joint tenants. Their shares in the holding were distinct. On account of abatement of the suit against one of them, the decree passed against the other two was a money decree and in the sale in execution thereof, only their interests and not the entire holding could come to the auction-purchaser. The circumstances of each case must have to be taken into account to decide whether the ends of justice would be met by annulling the whole sale or by exonerating only the person whose interests are not affected by the sale. The cases cited for the respondent Chhaterbijai Singh v. Damodar Das, MANU/BH/0113/1932 : AIR 1933 Pat 223; Mt. Raisuunissa v. Mojibur Rahman, MANU/BH/0055/1961 : AIR 1961 Pat 213; Shila Pal v. Comilla Banking Corporation Ltd., MANU/WB/0035/1944 : AIR 1945 Cal 434 and Chako Pyli v. Iype Varghese AIR 1956 TC 147 (FB) do not militate against this rule. The two other judgment-debtors having kept quiet all through in spite of notices to them, the sale which could be voidable on account of fraud need not be disturbed if full justice can be done otherwise to the respondent No. 1.

19. On a consideration of all the relevant matters and circumstances, I am of the view that the executing Court should have held that the decree and the sale were void so far as the interests of respondent No. 1, Sudarsan Rai, were concerned.

20. The result is that the appeal is allowed in part and the order of the court below is modified to the extent indicated above. In the circumstances of the case, parties should bear their own costs throughout.

Udai Sinha, J.

21. I agree.

A.B.N. Sinha, J.

22. I agree.

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