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the motor business subsequent to March 31, 1946. His subsequent suit to enforce a part of the claim is founded on the same cause of action which he deliberately relinquished. We are clear, therefore, that the cause of action in the two suits being the same, the suit is barred under Order II, rule 2(3), of the Civil Procedure Code.

As the suit is barred both by *res judicata* and Order II, rule 2(3), of the Civil Procedure Code, no further question as to the applicability of section 90 of the Indian Trusts Act can possibly arise under the circumstances.

The result is that we allow the appeal and dismiss the suit with costs throughout.

Appeal allowed.

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MANILAL MOHANLAL SHAH AND OTHERS

v.

SARDAR SAYED AHMED SAYED MAHAMAD AND ANOTHER.

[MEHR CHAND MAHAJAN C.J., VIVIAN BOSE and GHULAM HASAN JJ.]

Civil Procedure Code (Act V of 1908), Order XXI, rules 84 and 85—Provisions requiring deposit of 25 per cent of purchase money immediately after sale and payment of balance within 15 days of the sale—Whether mandatory—Non-compliance with such provisions —Legal effect thereof on sale—Inherent powers—Whether can be exercised—Civil Procedure Code—Order 21, rule 72—Decree-holder not to bid for or purchase property without permission—This provision directory.

Held, that the provisions of rules 84 and 85 of Order XXI of the Code of Civil Procedure requiring the deposit of 25 per cent of the purchase money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and if these provisions are not complied with there is no sale at all.

Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity.

The inherent powers of the Court cannot be allowed to circumvent the mandatory provisions of the Code and relieve the purchasers of their obligation to make the deposit.

Under Order XXI, rule 72, of the Code of Civil Procedure a decree-holder cannot purchase property at the Court-auction in execution of his own decree without the express permission of the Court and that when he does so with such permission, he is entitled to a set-off, but if he does so without such permission, then the court has a discretion to set aside the sale upon the application by the judgment-debtor, or any other person whose interests are affected by the sale. As a matter of pure construction this provision is directory and not mandatory.

Rai Radha Krishna and Others v. *Bisheshar Sahai and Others* (49 I.A. 312), *Munshi Md. Ali Meah* v. *Kibria Khatun* (15 Weekly Notes (Cal.) p. 350), *Sm. Annapurna Dasi* v. *Bazley Karim Fezley Moula* (A.I.R. 1941 Cal. 85), *Nawal Kishore and Others* v. *Buttu Mal and Subhan Singh* (I.L.R. 57 All. 658), *Haji Inam Ullah* v. *Mohammad Idris* (A.I.R. (30) 1943 All. 282), *Bhim Singh* v. *Sarwan Singh* (I.L.R. 16 Cal. 33), *Nathu Mal* v. *Malawar Mal and Others* (A.I.R. 1931 Lah. 15) and *A. R. Davar* v. *Jhinda Ram* (A.I.R. 1938 Lah. 198) referred to :

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 93 of 1953.

Appeal by Special Leave granted by the Supreme Court of India, by its Order dated the 5th March, 1951, from the Judgment and Decree dated the 28th January, 1949, of the High Court of Judicature at Bombay in Appeal from Order No. 43 of 1947 arising out of the Order dated the 14th April, 1947, of the Court of the Joint First Class Sub-Judge at Ahmedabad in Darkhast No. 249 of 1940.

Appellant No. 1 in person for self and co-appellants.

C. K. Daphtary, Solicitor-General for India (*J. B. Dadachanji* and *A. C. Dave,* with him) for respondent No. 1.

1954. April 14. The Judgment of the Court was delivered by

GHULAM HASAN J.—This appeal brought by the auction-purchasers by special leave raises the question of the validity of a sale of certain properties which took place on August 13, 1942. The respondents are the judgment-debtor and the legal representative of the deceased decree-holder.

The decree-holder applied on March 30, 1940, for execution of his decree by sale of 4 lots of property

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belonging to the judgment-debtor. The properties were valued at Rs. 1,50,000 and were subject to a previous mortgage of Rs. 60,000 existing in favour of the auction-purchasers. It appears that under the terms of the mortgage-deed the mortgagees were entitled to proceed in the first instance against the first 3 lots and against the fourth lot only in the event of a deficiency in sale price to cover the decretal amount. The first 3 lots with which alone we are concerned in the appeal were sold to the mortgagees for Rs. 53,510 on August 13, 1942. They were sold free from the encumbrance under the order of the Court passed at the instance of the decree-holder and the mortgagees but without notice to the judgment-debtor. It may, however, be noted that on the application of certain third parties their right of annuity over the properties sought to be sold was notified in the sale proclamation. On the same date the mortgagees applied for a set-off stating that the purchase price was Rs. 53,510 while the amount due to them was Rs. 1,20,000. The Court allowed the set-off then and there. It is important to bear in mind that the mortgagees had filed no suit and obtained no decree to recover the money due on the mortgage.

The order notifying the claim to annuity was challenged by the judgment-debtor in revision to the High Court but it was dismissed on November 10, 1943, by Sen J. who observed that as the sale had already taken place, the proper remedy of the judgment-debtor was to move the Court for setting aside the sale. Thereupon the judgment-debtor applied on November 20, 1943, under Order XXI, rule 90, of the Civil Procedure Code to have the sale set aside (Exhibit 51). Allegations imputing fraud and collusion to the mortgagees were made in the application, in particular it was alleged that the 3 lots were purchased at a grossly inadequate price by under-valuing them in the proclamation and that the mortgagees not having paid 25% of the bid, the sale should not have been sanctioned in their favour. While this application was pending, the judgment-debtor made another application on January 15, 1947, challenging the sale as a nullity on the ground that the purchaser had neither

made the deposit required under rule 84 of Order XXI, nor paid the balance of the purchase-price as required by rule 86, and praying for resale of the property to realise the price. The order allowing set-off was attracted as being without jurisdiction. No separate order was passed on this application as the application Exhibit 51 was granted on the same grounds. The trial Court found that at the time of attachment on April 30, 1940, lots Nos. 1 and 2 and lot No. 3 were valued at Rs. 40,000 each separately but at the time of proclamation of sale on March 6, 1942, the first two were valued at Rs. 45,000 and the third at Rs. 8,000 only. The property did not consist of mere survey numbers but admittedly had bungalows, and superstructures and in the opinion of the Court the subsequent valuation was bound to mislead bidders. The Court, however, set aside the sale on the ground that the provisions of Order XXI, rules 84 and 85, had not been complied with in that the price was not deposited but a set-off was wrongly claimed and allowed in the absence of the judgment-debtor by the Court which had no authority or jurisdiction. The Court observed.

"There is nothing to show that these opponents took any permission from the Court to bid at the auction and in fact they could hardly have obtained any such permission, they being mortgagees whose dues had yet to be proved and determined. If they could ask for set-off, there is no reason why they should not be required also to seek previous permission from the Court to bid under Order XXI, rule 72, of the Civil Procedure Code. It may be noted that one of these opponents is himself a pleader and he was not justified in taking such an unauthorised order from the Court without fully acquainting with all the facts. Under all these circumstances, these opponents can with little justification avoid the consequences of non-compliance with the provisions of Order XXI, rules 84 and 85, referred to above. Without proving their claim under the mortgage, they have succeeded in purchasing for a gross under-value these properties and even that value they have not paid in Court by taking recourse to the device of set-off..... ..... In my opinion, there could not be a

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more fraudulent and materially irregular procedure than what has taken place in the present case at the instance of these mortgagees, to the great detriment and injury of the present applicant, *viz.*, the judgment-debtor."

The Court held that the application under rule 90 was barred by limitation but this being a case of a void sale and not of a mere material irregularity the Court was bound to re-sell the property irrespective of any application being made by the judgment-debtor.

The High Court of Bombay (Chagla C. J. and Gajendragadkar J.) dismissed the appeal of the mortgagee-purchasers on the ground that the order of the trial Court was under Order XXI, rule 84 and/or rule 86, of the Civil Procedure Code and therefore no appeal lay against such and order. The High Court held that the order of set-off was without jurisdiction and the subsequent deposit of the purchase price on December 14, 1945, made long after the period had elapsed was of no avail.

One of the auction-purchasers, who is a pleader, has himself argued the appeal before us. The principal question which falls to be considered is whether the failure to make the deposit under Order XXI, rules 84 and 85, is only a material irregularity in the sale which can only be set aside under rule 90 or whether it is wholly void. It is argued that the case falls within the former category and the application under rule 90 being barred by limitation, the sale cannot be set aside. It is also contended that the Court having once allowed the set-off and condoned the failure to deposit, the mistake of the Court should not be allowed to prejudice the purchasers who would certainly have deposited the purchase price but for the mistake. We are of opinion that both the contentions are devoid of substance. In order to resolve this controversy a reference to the relevant rules of Order XXI of the Civil Procedure Code will be necessary. These rules are 72, 84, 85 and 86 :

"72. (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, ...

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale ; .....

"84. (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirement of this rule.

"85. The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

"86. In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold."

The scheme of the rules quoted above may be shortly stated. A decree-holder cannot purchase property at the Court-auction in execution of his own decree without the express permission of the Court and that when he does so with such permission, he is entitled to a set-off, but if he does so without such permission, then

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the Court has a discretion to set aside the sale upon the application by the judgment-debtor, or any other person whose interests are affected by the sale (Rule 72). As a matter of pure construction this provision is obviously directory and not mandatory—See *Rai Radha Krishna and Others* v. *Bisheshar Sahai and Others*(1). The moment a person is declared to be the purchaser, he is bound to deposit 25 per cent. of the purchase-money unless he happens to be the decree-holder, in which case the Court may not require him to do so (Rule 84).

The provision regarding the deposit of 25 per cent. by the purchaser other than the decree-holder is mandatory as the language of the rule suggests. The full amount of the purchase-money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of a set-off. The provision for payment is, however, mandatory.... (Rule 85). If the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the Court to re-sell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property...(Rule 86).

It is not denied that the purchasers had not obtained any decree on foot of their mortgage and the claim of Rs. 1,20,000 which they put forward before the execution Court had not been adjudicated upon or determined. The mortgagees, one of whom is a pleader, applied on the day of the sale claiming a set-off on foot of the mortgage. The Court without applying its mind to the question immediately passed the order allowing the set-off. This claim was obviously not admissible under the provisions of rule 84 which applies only to the decree-holder. The Court had clearly no jurisdiction to allow a set-off. The appellants misled the Court into passing a wrong order and obtaining the advantage of a set-off while they knew perfectly well that they had got no decree on foot of the mortgage and their claim was undetermined. There was default in

(1) 49 I.A. 312.

depositing 25 per cent. of the purchase-money and further there was no payment of the full amount of the purchase-money within fifteen days from the date of the sale. Both the deposit and the payment of the purchase-money being mandatory under the combined effect of rules 84 and 85, the Court has the discretion to forfeit the deposit but it was bound to re-sell the property with the result that on default the purchaser forfeited all claim to the property. These provisions leave no doubt that unless the deposit and the payment are made as required by the mandatory provisions of the rules, there is no sale in the eye of law in favour of the defaulting purchaser and no right to own and possess the property accrues to him.

In two cases decided by the Calcutta High Court, *viz., Munshi Md. Ali Meah* v. *Kibria Khatun*(1), and *Sm. Annapurna Dasi* v. *Bazley Karim Fazley Moula*(2), the sale was held to be no sale where the purchaser had failed to deposit the balance of the purchase-money as required by rule 85. A similar view was taken by a Division Bench of the Allahabad High Court in *Nawal Kishore and Others* v. *Buttu Mal and Subhan Singh*(3). The provisions of rule 86 were held to be mandatory in another decision of the same Court, *Haji Inam Ullah* v. *Mohammad Idris*(4) and it was held that the Court was bound to re-sell the property upon default irrespective of any application being made by any party to the proceedings. The case of *Bhim Singh* v. *Sarwan Singh* (5) was a case of failure to make a deposit as required by section 306 of the Code of 1882 (corresponding to rule 85 of the present Code). The Court treated it as a material irregularity in conducting the sale which must be enquired into upon the application under section 311, (corresponding to rule 90 of the present Code), and not by a separate suit to set aside the sale. The Court did not apply its mind to the question whether the provisions of section 306 being mandatory the sale should not be treated as a nullity for non-compliance with those provisions. The decision of

(1) 15 Weekly Notes (Cal.) p. 350.
(2) A.I.R. 1941 Cal. 85.
(3) 57 All. 658.
(4) A.I.R. (30) 1943 All. 282.
(5) 16 Cal. 33.

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a single Judge (Tapp J.) in *Nathu Mal* v. *Malawa Mal and Others*(1) is distinguishable upon its facts. There the auction-purchaser had actually tendered the money but the payment was postponed by consent of parties pending the disposal of the objection by the judgment-debtor. We do not agree with the remark made in that case that the provisions of rule 85 are intended "to be directory only and not absolutely mandatory." A Division Bench of the same Court (Tek Chand and Abdul Rashid JJ.) held in *A. R. Davar* v. *Jhinda Ram* (2), that the Court had no jurisdiction to extend the time for the payment of the balance of the purchase-money under rule 85 and must order resale under rule 86.

Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent. of the purchase-money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent. of the purchase-money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question, of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to re-sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all.

It was urged before us that the Court could allow a set-off in execution proceedings under its inherent powers apart from the provisions of Order XXI, rule 19, of the Civil Procedure Code. We do not think that the inherent powers of the Court could be invoked to

(1) A.I.R. 1931 Lah. 15. (2) A.I.R. 1938 Lah. 198.

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circumvent the mandatory provisions of the Code and relieve the purchasers of their obligation to make the deposit. The appellants by misleading the Court want to benefit by the mistake to which they themselves contributed. They cannot be allowed to take advantage of their own wrong.

The appeal fails and is dismissed with costs.

Appeal dismissed.

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KIRAN SINGH AND OTHERS

v.

CHAMAN PASWAN AND OTHERS.

[MUKHERJEA, VIVIAN BOSE, GHULAM HASAN and VENKATARAMA AYYAR JJ.]

Suits Valuation Act (VII of 1887), s. 11—Appeal under-valued and presented to a Court of inferior jurisdiction—Whether a decree passed by it on the merits is a nullity—Whether mere change of form or error in a decision on the merits, prejudice within the meaning of section 11 of the Suits Valuation Act—Whether a party who invokes a jurisdiction of a Court can complain of prejudice on the ground of over-valuation or under-valuation.

The policy underlying section 11 of the Suits Valuation Act, as also of sections 21 and 99 of the Code of Civil Procedure, is that when a case has been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless a failure of Justice has resulted. The policy of the Legislature has been to treat objections as to jurisdiction, both territorial and pecuniary, as technical and not open to consideration by an appellate Court, unless there has been prejudice on the merits.

Mere change of form is not prejudice within the meaning of section 11 of the Suits Valuation Act; nor a mere error in the decision on the merits of the case. It must be one directly attributable to over-valuation or under-valuation.

Whether there has been prejudice or not is a matter to be determined on the facts of each case. The jurisdiction under section 11 is an equitable one to be exercised, when there has been an erroneous assumption of jurisdiction by a Subordinate Court as a result of over-valuation or under-valuation and a consequential failure of justice. It is neither possible, nor desirable to define such jurisdiction closely or confine it within stated bounds.