

LETTERS PATENT APPEAL

Before Mehar Singh and Prem Chand Pandit, JJ.

JANAK RAJ,—Appellant.

versus

GURDIAL SINGH AND SWARAN SINGH,—Respondents

Letters Patent Appeal No. 20 of 1965.

Code of Civil Procedure (V of 1908)—Order 21 Rule 92—Property of judgment-debtor sold in execution of ex-parte decree against him purchased by stranger—Before confirmation of sale, application filed by judgment-debtor for setting aside the ex-parte decree—Proceedings for confirmation of sale stayed—Ex-parte decree set aside—Executing Court—Whether has jurisdiction to confirm the sale thereafter—S. 47—Explanation—A stranger auction-purchaser—Whether party to the suit for the purposes of the section.

1965

December 24th.

Held, that the confirmation of the sale under Rule 92 of Order 21 of the Code of Civil Procedure takes place in a pending execution application and is a step in execution towards the discharge and satisfaction of the decree as on confirmation the auction-purchaser obtains title absolute to the property and not before, and the auction-purchase money then goes to the decree-holder in satisfaction of the decree. But where there is no decree, there can be no execution application, and it follows that there cannot be a step to further any such execution of a non-existent decree. When a decree is reversed or set aside and although a sale has taken place before reversal or setting aside of it, yet the sale cannot be confirmed subsequently because that would be a step in execution of non-existent decree. Hence there is no jurisdiction in the executing Court to confirm the sale in execution proceedings relating to a non-existent decree.

Held, that the Explanation to section 47 of the Code makes an auction-purchaser a party to the suit for the purposes of the section. Even a stranger auction-purchaser is no longer a stranger for he is treated a party to the suit and being a party to the suit he is placed for the matter of purchasing the property in execution of a decree in a public auction in exactly the same position as the decree-holder making such a purchase.

Letters Patent Appeal under clause 10 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Shamsher Bahadur, dated 26th November, 1964, in E. S. A. No. 1592 of 1963.

Appellant in person.

H. S. WASU AND B. S. WASU, ADVOCATES, for the Respondents.

JUDGMENT

Mehar Singh, J. MEHAR SINGH, J.—This is an auction-purchaser's appeal under clause 10 of the Letters Patent from the judgment, dated November 26, 1964, of a learned Single Judge, whereby the order of the executing Court confirming the sale in question in favour of the appellant, which order had been upheld on appeal by the Court of first appeal, has been reversed.

An *ex parte* decree for Rs. 819 was obtained on February 27, 1961, by Swaran Singh, decree-holder, against respondent Gurdial Singh, judgment-debtor. An application to execute the decree having been made by the decree-holder, a warrant for the attachment of the house of the judgment-debtor was issued on May 10, 1961. In due course that house was put to sale and, in a public auction, the highest bidder for Rs. 5,100 was the appellant. This was on December 16, 1961.

The judgment-debtor on January 2, 1962, made an application to have the *ex parte* decree against him set aside. On January 20, 1962, he filed an objection petition against the sale of the house. No provision under which the objection petition was made was stated in it, but the judgment-debtor stated that the value of the house was Rs. 25,000 and it was sold at Rs. 5,100, that the auction was not conducted in a proper manner inasmuch as there was not due publication, and that it did not take place at the proper time. In the last part of the objection petition he stated that an application for setting aside the *ex parte* decree against him had already been made, and sought a stay of the proceedings in execution and sale. By an order of April 19, 1962, the executing Court stayed the execution of the decree till the disposal of the application for setting aside the *ex parte* decree, and obviously the confirmation of the sale was held over, but in any case, the auction-purchaser did not immediately move for confirmation of the sale under Order 21, Rule 92 of the Code of Civil Procedure.

On October 26, 1962, the application of the judgment-debtor to set aside the *ex parte* decree was accepted and the *ex parte* decree against him was set aside on October

26, 1962. After the setting aside of the *ex parte* decree an application was moved on November 3, 1962, about a week after the order setting aside the *ex parte* decree, by the appellant (auction-purchaser), praying that this Hon'ble Court by order dated 26th October, 1962, has set aside the *ex parte* decree and now it is prayed that the execution proceedings may kindly be revived and orders confirming the sale may kindly be passed under Order 21, Rule 92, Civil Procedure Code. To this application the former judgment-debtor, Gurdial Singh, respondent, made his reply on November 7, 1962. He opposed the application of the auction-purchaser for confirmation of the sale and among other matters stated in his reply—(a) that 'application for revival of execution proceedings is not maintainable, because by the setting aside of *ex parte* decree the execution proceedings are automatically vacated: no question of revival arises', (b) that 'the auction-purchaser is in conspiracy and collusion with the decree-holder. One Santa Singh is a partner with the auction-purchaser in the business and Santa Singh is an uncle of Swaran Singh. So the auction-purchaser is bound by the final result', and (c) that 'the auction-purchaser is not entitled to the confirmation of sale. The sale is automatically set aside'. Thus after the setting aside of the *ex parte* decree against the judgment-debtor, the auction-purchaser sought confirmation of the sale under Order 21, Rule 92, and the former judgment-debtor in reply urged that there was no decree to be executed, that with the setting aside of the *ex parte* decree the execution proceedings came to an end, that with the end of the execution proceedings the sale came to be set aside as such, and that the auction-purchaser was in conspiracy with the uncle of the decree-holder and thus was aware of the whole state of affairs. He in effect said that there was no occasion for confirmation of the sale. There is no evidence of collusion between the auction-purchaser and the uncle of the decree-holder and at no stage have the Courts considered this allegation of fact. This is thus dropped from consideration.

On August 31, 1963, the executing Court first considered the application made by the auction-purchaser for revival of the execution application of the decree-holder. It overruled the objection of the respondent (former judgment-debtor) that there was no decree that could be executed.

Janak Raj
v.
Gurdial Singh
and Swaran
Singh

Mehar Singh, J.

Janak Raj
v.
Gurdial Singh
and Swaran
Singh

Mehar Singh, J.

It accepted the application of the auction-purchaser, revived the execution application of the decree-holder, and then proceeded to consider, in that execution application, the earlier objection petition of the respondent, dated January 20, 1962, praying for the setting aside of the sale on the grounds essentially mentioned in Rule 90 of Order 21 of the Code of Civil Procedure. It dismissed that objection petition of the respondent, and immediately proceeded to make an order under rule 92 of Order 21, confirming the sale of the house in favour of the auction-purchaser. In appeal, the learned Judge of the first appellate Court has affirmed this order of the executing Court confirming the sale in favour of the auction-purchaser. The learned Single Judge has accepted the second appeal of the respondent thereby setting aside the order of confirmation of the sale, and that mainly on two grounds. The first ground which has prevailed with the learned Judge is that on the *ex parte* decree having been set aside, there was no executable decree pursuant to which any execution application to execute the set aside decree could be revived and then the sale confirmed. In this respect the learned Judge has relied upon *Doyamoyi Dasi v. Sarat Chunder Mojumdar* (1). In that case Maclean, C.J., observed that ".....when the *ex parte* decree was discharged, no decree in the suit remained. There was no decree existing in the suit, and if there were no decree, it is difficult, to my mind, to see how there could be any sale which could be confirmed when the decree under which it was made had ceased to exist; when the decree was discharged, the sale which purported to be made under that decree fell to the ground. The point arises upon an application to the Munsif to confirm the sale, which he refused to do, upon the ground that he should not confirm a sale under a decree which was not subsisting. The latter words of section 316 of the Code of Civil Procedure (1882) tend to show that the sale cannot be confirmed, if the decree under which it was effected has ceased to exist", and Banerjee, J., said that "..... the appellant contends that the Munsif was right in refusing to confirm the sale, while for the respondent it is said that there is no express provision in the Code directing the Court not to confirm a sale when, at the date when such confirmation is applied for, the decree in execution of which the sale took place, ceases to be a subsisting

(1) I.L.R. (1898)25 Cal. 175.

decree. But the provisions of section 316 of the Code go to show that the Court ought not to confirm a sale, when at the time such confirmation is asked for, the decree had ceased to be a subsisting decree. In the present case, the decree, which was an *ex parte* decree, had been set aside by an order under section 108 of the Code. That being so, and there being no subsisting decree, the first Court was quite right in refusing to confirm the sale.....". In the Code of Civil Procedure of 1882, section 316 read—"When a sale of immovable property has become absolute in the manner aforesaid the Court shall grant a certificate stating the property sold and the name of the person who, at the time of sale, is declared to be the purchaser. Such certificate shall bear the date of confirmation of sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such sale and not before, provided that the decree under which the sale took place was still subsisting at that date." The corresponding section 65 in the present Code of Civil Procedure is in these words—"Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute." It would be seen that the proviso to section 316 of the Code of 1882 was to the effect—"Provided that the decree under which the sale took place was still subsisting at that date"—, does not appear with section 65 of the present Code. The decision of the learned Judge in *Doyamoyi Das's* case has proceeded on the effect of the proviso in section 316 of the Code of 1882, and thus that case is now distinguishable on this ground. The second ground upon which the learned Single Judge has based his conclusion is that section 47 of the Code of Civil Procedure has been amended by the Code of Civil Procedure (Amendment) Act, 1956 (Act 66 of 1956), with effect from December 2, 1966, and this Explanation has been substituted at the end of that section for the old Explanation—

"*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."

Janak Raj
".
Gurdial Singh
and Swaran
Singh

Mehar Singh, J.

Janak Raj
 v.
 Gurdial Singh
 and Swaran
 Singh

 Mehar Singh, J.

In view of this new Explanation to section 47, the learned Judge is of the opinion that an auction-purchaser is no longer a stranger but is a party to the suit for the purposes of this section, and he cannot escape the consequence upon the decree having been set aside in execution of which he has purchased a property.

In this appeal the auction-purchaser has argued his case in person. His argument is that he is a *bona fide* purchaser of the property for value and is not effected in his rights by the setting aside of the *ex parte* decree against the respondent. The respondent filed an application for setting aside the sale on the ground of material irregularity and fraud in publishing and conducting it and though he did not refer in his application to Rule 90 of Order 21, but throughout he has admitted that that application was in fact one under Rule 90 of Order 21. On the dismissal of that application, the appellant contends that under Rule 92 of Order 21, the executing Court had no option but a duty to confirm the sale, which it in fact did. The order was upheld in appeal. And the auction-purchaser has pressed that the learned Single Judge could not reverse that order because the executing Court had done its duty as imperatively it was bound to do according to Rule 92 of Order 21. He then points out that *Dojamoyi Dasi's case* has no relevance to the facts of the present case because that was decided under the Code of 1882 and with particular reference to the proviso in section 316, in the face of which not only could an auction-sale not be confirmed but even a sale certificate could not be granted unless the decree was subsisting. He seeks support of his case from *Nanhelal v. Umrao Singh* (2), to which reference will be made in some detail a little later. He relies on some other cases in this respect to which also reference will presently be made. The reply on behalf of the respondent is that the *ex parte* decree having been set aside and the execution of the decree having been stayed during the pendency of the application to set aside the *ex parte* decree, as soon as the *ex parte* decree was set aside there was no execution application left in existence, there was no question of revival of any stayed execution application and consequently there could be no question of making an order

(2) A.I.R. 1931 P.C. 33.

confirming the sale, which could only be made in and consequent upon execution proceedings connected with an executable decree. The learned counsel points out that it makes not the least difference that the application of the respondent to set aside the sale, which was virtually an application under Order 21, Rule 90, was dismissed, because after the setting aside of the *ex parte* decree when the auction-purchaser (appellant) sought revival of the execution application and confirmation of the sale, the respondent within a few days resisted that in the manner as already pointed out.

Janak Raj
v.
Gurdial Singh
and Swaran
Singh
Mehar Singh, J.

There are four cases in this respect that may be considered. The first case is where a sale has taken place in execution of a decree and has been confirmed, whereafter the decree is either reversed or, if *ex parte*, set aside, and the purchaser is the decree-holder. In that case the sale is treated as cancelled. The second is exactly the same case, but the purchaser is a stranger who makes purchase for value and in good faith. He is unaffected by the non-existence of the decree. These two propositions are settled by the Privy Council in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (3). However, in that case the sale had been confirmed before the reversal of the decree, in other words, the sale had been confirmed during a pending and a validly subsisting execution application. When the sale took place and was confirmed, the decree was there and an execution application in execution of it was there according to law, both being valid and subsisting at the time. This case has been followed in numerous cases, a number of which are referred to at page 205 of *Krishna Chandra Mandal v. Jogendra Narain Roy* (4). In the same line are *Chitambar Shrinivasthat v. Krishnappa* (5), *Mt. Ahmadi Begum v. The District Magistrate, Agra* (6), *Pullata Lakshminarayan v. Bakkida Ramanna* (7), *Lalji Sah v. Sat Narain Bhagat* (8), and *S. Chokalingam Asari v. N. S. Krishna Iyer* (9), cases on which the appellant (auction-purchased) has

(3) I.L.R. (1888) 10 All. 166.

(4) A.I.R. 1915 Cal. 203.

(5) I.L.R. (1902) 26 Bom. 543.

(6) A.I.R. 1951 All. 830.

(7) A.I.R. 1954 Andh. Prad. 5.

(8) A.I.R. 1962 Pat. 182.

(9) A.I.R. 1964 Mad. 404.

Janak Raj
v.
Gurdial Singh
and Swaran
Singh

Mehar Singh, J.

placed reliance in support of his argument. In each one of these cases the sale had been confirmed before the decree was reversed and hence was a valid sale pursuant to a valid execution application seeking to execute a subsisting decree at the time. Even in the case of a stranger purchaser if he does not act in good faith, the sale can still not be confirmed if the decree has been either set aside or reversed, as was held in *The Chota Nagpur Banking Association v. C.T.M. Smith* (10). The third case is that in which in execution of a subsisting decree it is said that the decree has been satisfied in one form or another, and the sale be not confirmed. The cases in this line are *Rewa Mahton v. Ram Kishen Singh* (11), *Nanhelal v. Umrao Singh* (2), and *P. V. Venkatesh Kotadia v. Shantha Bai* (12). In all these cases, in the case of a *bona fide* auction-purchaser for value, the Court either refused to record satisfaction of the decree on a settlement between the decree-holder and the judgment-debtor or to recognise the satisfaction to the detriment of such purchaser, but in all those cases there was a valid decree which was being executed and the refusal of the Court to accept satisfaction and confirmation of the sale took place pursuant to a validly subsisting execution application under a validly subsisting decree. In my opinion, these three cases do not bear on the facts of the present case and the decisions cited in support of each one of these three cases are not helpful in the present case. There is fourth case, which is the present case, in which an *ex parte* decree was passed against the respondent, on whose application it was set aside, and during the pendency of the application to set aside the *ex parte* decree, the sale took place in favour of the appellant, a stranger, but the execution application to execute the decree and confirmation of the sale were stayed till the disposal of the application to set aside the decree. After the *ex parte* decree had been set aside, the auction-purchaser (appellant) applied for confirmation of the sale under Order 21, Rule 92, when the executing Court dismissed the earlier objections to the sale by the respondent, now admittedly under Order 21, Rule 90, and proceeded to confirm the sale. At the time the sale was confirmed,

(10) I.L.R. (1943) 22 Pat. 315.

(11) I.L.R. (1887) 14 Cal. 18.

(12) A.I.R. 1961 Mad. 105.

there was no decree in existence. If there was no decree, there could be no execution application to execute a non-existent decree. If there was no execution application pending, no step could be taken to further the completion of a sale in a non-existent execution application. Confirmation of sale under rule 92 of Order 21 takes place in a pending execution application and is a step in execution towards the discharge and satisfaction of the decree as on confirmation the auction-purchaser obtains title absolute to the property and not before, and the auction-purchase money then goes to the decree-holder in satisfaction of the decree. Some argument has been urged by the appellant that although confirmation takes place under Order 21, Rule 92 and then only the sale becomes absolute, but by the statement in the rule itself the title of the auction-purchaser dates back to the date of the original sale. This is so, but it is not clear how this makes any difference whatsoever. For this result to come about, there must first be confirmation of the sale to make it an absolute sale. If that does not happen, this result does not come about. In such circumstances, in my opinion, there is no jurisdiction in the Court to confirm the sale in non-existent execution proceedings relative to a non-existent decree and on this ground the learned Judge was right in coming to the conclusion that the executing Court in confirming the sale in this case acted without jurisdiction. In *Basappa Bin Malappa Aki v. Dundaya Bin Shivlingaya* (13), the reversal of the decree took place subsequent to the sale but before the order was made confirming the sale, and the learned Judges observed—".....in the present case the decree was reversed while the sale was still incomplete; and from that moment the Court, which had made the decree, ceased to have jurisdiction to take any further steps to execute it. The Court, when it confirmed the sale, was probably not informed that its decree had been reversed, and the purchaser was probably ignorant of it. But the act of the Court in completing the sale was none the less without jurisdiction; and, being without jurisdiction, could confer no title." This was a case of a stranger purchaser. This case was followed in *Subbaya v. Vellamma* (14), which again was a case of a

Janak Raj
v.
Gurdial Singh
and Swaran
Singh
—
Mehar Singh, J.

(13) I.L.R. (1878) 2 Bom. 540.

(14) I.L.R. (1886) 9 Mad. 130

Janak Raj
v.
Gurdial Singh
and Swaran
Singh

Mehtar Singh, J.

stranger purchaser. The first was definitely not a case under the Code of Civil Procedure of 1882, and in the second the observations of the learned Judges are not based on section 316 of the Code of 1882. In the second case the confirmation took place after the reversal of the decree and the learned Judges held that it was not necessary to set aside the confirmation order, as it was void and made without jurisdiction. These two cases, unlike *Doyamoyi Dasi's case*, do not proceed on the proviso to section 316 of the Code of 1882 and in the earlier Code of 1859 there was no such provision as the proviso to section 316 of the Code of 1882. This will be found from the history of the Codes as given in *Sorimuthu Pillai v. Muthukrishna Pillai* (15). So these two cases proceed independently of a provision like the proviso to section 316 of the Code of 1882 to reach the conclusion that in the case of reversal of a decree there is no execution application that can exist to execute a non-existent decree, and the order of confirmation pursuant to such an execution application is void and without jurisdiction. Those two cases have been followed under the present Code in exactly the same circumstances as the present case, by the learned Judges in *Hariram v. Gopikisan* (16), in which the learned Judges have held, distinguishing *Zain-ul-Abdin Khan's case*, that where a decree is set aside in appeal as against one of the defendants, but in the meanwhile property has been sold in execution, though the sale has not been confirmed, the executing Court has no jurisdiction to confirm the sale to the extent of the share of the defendant against whom the decree has been set aside. It was a case of a stranger purchaser. In *Ariatullah v. Sashi Bhushan Hazrah* (17), the learned Judges on considering the omission of the proviso in section 316 of the Code of 1882 from section 65 of the present Code observed that "It is contended that the result of the omission of the proviso is that the Court is bound to confirm the sale if there is no application under rules 89, 90, or 91 or if such an application is made and disallowed whether or not there was a subsisting decree under which the sale is held. Now, if there is no subsisting decree the sale must be set aside under section

(15) A.I.R. 1933 Mad. 598.

(16) A.I.R. 1921 Nag. 121.

(17) A.I.R. 1920 Cal. 99.

47 of the Code, and although there may be an application under section 47 to set aside the sale on such a ground pending, the sale must (according to the respondent's contention) be confirmed under Order 21, Rule 92, though the next moment the sale will have to be set aside under section 47 on the ground that there was no subsisting decree. We do not think that that is contemplated by Order 21, Rule 92, Order 21, Rules 89, 90, 91 and 92, presuppose a valid decree under which the sale is held, and the first three rules provide for setting aside the sales, and Rule 92 says that if there be no application for setting aside the sale, or such an application is made and disallowed, the sale shall be confirmed. Rule 92 does not affect the power of the Court to refuse to confirm a sale, or make it compulsory to confirm the sale when the Court finds that the sale is held under a decree which did not authorise the sale. It seems unreasonable that the Court must confirm a sale under Order 21, Rule 92, although it finds that the foundation for the sale is gone, and then proceed to set aside the sale which it has confirmed, being fully aware that the sale was illegal. In the present case, having regard to the order passed on review, it must be held that execution could not be taken out for the amount for which execution was taken out, and the sales took place for amounts in respect to which there were no decrees existing at the time." There are cases which lend support to the view that where there is no decree, there can be no execution application, and it follows that there cannot be a step to further any such execution of a non-existent decree. When a decree is reversed or set aside and although a sale has taken place before reversal or setting aside of it, yet the sale cannot be confirmed subsequently because that would be a step in execution of a non-existent decree. There are cases to the contrary and those may now be considered. It has already been pointed out that *Nanhelal v. Umrao Singh* (2) is not a case to the contrary for in that case when certification of the satisfaction of the decree was sought by the parties to the decree, the Court refused because in an auction-sale a stranger purchaser had purchased the property in good faith, and while rejecting the certification, the confirmation of the sale was made. It has already been pointed out that in that case when the confirmation was made there

Janak Raj
v.
Gurdial Singh
and Swaran
Singh

—————
Mehar Singh, J.

Janak Raj
v.
Gurdial Singh
and Swaran
Singh

Mehar Singh, J.

was a subsisting decree and there was a subsisting valid execution application pending, and it was in such a valid execution application that the sale was confirmed. The first case taking the contrary view is *Manikka N. Perumal Iyer v. Srinivasa Ayyangar* (18), and the second case is *Birdichand v. Ganpatsao Narayansao Kalar* (19). The first of these cases proceeds entirely on the basis of *Nanhelal's case* and it has already been pointed out that that is a case substantially of a different type in which when the sale was confirmed, a valid execution application was pending. In the second case, that is to say, *Birdichand's case*, actually there was a subsisting decree, though it had been varied in appeal and an execution application to execute the subsisting decree was pending which must be held to be a valid execution application in itself. Consequently this is the same type of a case as *Nanhelal's case*. Another similar case is *Sorimuthu Pillai's case*, but that too follows *Nanhelal's case*. In *Baburam Lal v. Debdas Lala* (20), K. C. Das Gupta, J., Debabrata Mookerjee, J., concurring, held that "Where the lower Court's decree has been reversed, the execution proceedings cannot obviously go on". It is in this approach that the conclusion is inevitable that on the setting aside of the *ex parte* decree in the present case no execution proceedings subsisted, and, that being the case, there could be no step in furtherance of those execution proceedings in the form of confirmation of the sale under Order 21, Rule 92. So on this ground alone the judgment of the learned Single Judge must be maintained.

The appellant (auction-purchaser) has contended that the objection petition of the respondent for setting aside the sale, which is now accepted to have been made under Order 21, Rule 90, having been made 35 days after the sale, was barred by time, for the limitation is 30 days from the date of the sale under article 166 of the Limitation Act, 1908, and even if such an objection is raised under section 47 of the Code, he contends that the limitation is the same under the same article. It is not necessary to pursue this argument any further because the

(18) A.I.R. 1941 Mad. 398.

(19) A.I.R. 1938 Nag. 525.

(20) A.I.R. 1959 Cal. 73.

Supreme Court has held in *Merla Ramanna v. Nallaparaju* (21), that where a sale in execution is inoperative and void, an application by a Judgment-debtor to have it declared void and for appropriate relief is governed by article 181 and not article 166 of the Limitation Act, 1908. Under the former article the limitation is three years. In the present case the execution application had been stayed pending the application for setting aside the *ex parte* decree. After the *ex parte* decree had been set aside, there was no question of revival of any execution application and any objections accompanying that application for setting aside the sale under Order 21, Rule 90 immediately fell through with the execution application. Assuming that that objection petition was barred by time, it still makes no difference in the present case because within a few days of the setting aside of the *ex parte* decree the appellant (auction-purchaser) applied for revival of the execution proceedings and confirmation of the sale and within a couple of days the respondent replied that there was no validly subsisting sale which could be confirmed. Even if this reply of the respondent is to be considered as an application for a declaration that there is no sale in existence which can be confirmed, that was made within less than a fortnight of the setting aside of the *ex parte* decree and is within time, no matter under what article of the Limitation Act it is considered. This argument is, therefore, without force.

Janak Raj
v.
Gurdial Singh
and Swaran
Singh

Mehtar Singh, J.

Neither side has been able to cite any case on the new Explanation to section 47 of the Code of Civil Procedure, and I am disposed to agree with the approach of the learned Single Judge that as that Explanation now makes an auction-purchaser a party to the suit for the purposes of section 47, it has taken away the distinction which the Privy Council drew between a decree-holder-purchaser and a stranger-purchaser at an auction sale in *Zain-ul-Abdin Khan's case*. Now, even the stranger auction purchaser is no longer a stranger for he is treated a party to the suit and being a party to the suit he is placed for the matter of purchasing property in execution of a decree in a public auction in exactly the same position as the decree-holder making such a purchase. On this approach even if the sale has been validly confirmed here, which is not the case, it must be

Janak Raj treated as cancelled as held by the Privy Council in the
 v. case last referred to.
 Gurdial Singh
 and Swaran
 Singh

 Mehar Singh, J
 Pandit, J.

The result is that this appeal fails and is dismissed, but, in the circumstances of the case, the parties are left to their own costs.

PANDIT, J.—I agree with my learned brother that this appeal should be dismissed, but the parties be left to bear their own costs.

K.S.K.

REVISIONAL CIVIL

Before D. Falshaw, C.J.

SANT RAM AND ANOTHER,—*Petitioners.*

versus

BOLA DEVI AND AMRIT KAUR,—*Respondents.*

Civil Revision No. 399 of 1965

1966
 January. 6th.

Succession Act (XXXIX of 1925)—S. 373(3)—Intricate questions of law or fact involved—Court—Whether bound to grant succession certificate or can direct the parties to have the matter decided in a regular suit.

Held, that the use of the word "may" in sub-section (3) of section 373 of the Indian Succession Act, 1925, in contradistinction to the word 'shall' in the preceding subsection, clearly implies a discretion and if the Court feels that the questions of title involved are not capable of decision in summary proceedings under the Act, he is permitted to say so and to leave the parties to establish their rights in a regular suit.

Petition under Section 115 of the Code of Civil Procedure, for revision of the order of Shri Om Parkash Aggarwal, Subordinate Judge, Ist Class, Amritsar, dated 19th January, 1965, consigning to the record room an application filed under section 372 of the Indian Succession Act for a succession certificate regarding the estate of Shrimati Babba Devi deceased.

BHAGIRATH DASS AND B. K. JHINGAN, ADVOCATES, for the Petitioners.

H. S. WASU, ADVOCATE, for the Respondents.