The object of attachment is to take the property out of the disposition of the judgment-debtor. Though the omission to attach under section 274 of the Code of Civil Procedure was an irregularity, we are not able to hold that the irregularity was material or that plaintiff has been prejudiced thereby.

It is next contended that the document contains no provision for interest *post diem*, and that consequently the claim is one for damages and barred under article 116 of the Limitation Act. But on the true construction of the document the last clause appears to provide for interest to date of payment and to make the same a charge on the property; and as interest is not asked for at the enhanced rate there is no question of reasonable compensation under section 74 of the Contract Act, nor is the suit barred under the Limitation Act.

This appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

AMIR BAKSHA SAHIB (PETITIONER), APPELLANT,

v.

VENKATACHALA MUDALI (COUNTER-PETITIONER), RESPONDENT. *

1895. July 26. August 6.

Civil Procedure Code—Act XIV of 1882, *ss.* 293, 306, 588—*Execution sale—Default by purchaser in paying deposit—Remedy against purchaser.*

The purchaser at an execution sale failed to make the deposit of 25 per cent. under Civil Procedure Code, section 306, alleging that the property was discovered by him subsequently to the sale to be subject to an incumbrance. The property was put up for sale again and knocked down for a smaller sum. The decree-holder sought in execution to recover the amount of the difference from the first purchaser. The Court of first instance made an order dismissing the application:

Held, that an appeal lay against the order in question.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, in miscellaneous appeal No. 18 of 1893, dismissing the appeal against the order of T. Venkataramayya, District Munsif of Vellore, in execution petition No. 527 of 1893.

* Appeal against Appellate Order No. 40 of 1894.

AMIR BAKSHA SAHIB v. VENKATACHALA MUDALI.

A house was brought to sale in execution of a decree in original suit No. 17 of 1893 on the file of the District Munsif of Vellore. The house was knocked down to Venkatachala Mudali for Rs. 280, but he did not deposit 25 per cent. of the purchase money as required by Civil Procedure Code, section 306. The house was accordingly put up again for sale on the next day, and it was purchased for Rs. 205 by the decree-holder, who had permission to bid. Venkatachala Mudali explained that he would not pay the deposit for the reason that, since the sale, he had heard of an incumbrance to which the property was subject. The present application was made by the decree-holder, who sought to recover Rs. 75 from Venkatachala Mudali.

The District Munsif dismissed the application on the ground that the applicant had falsely stated in his petition for execution that the house was free from incumbrances and that he was now seeking to take advantage of his own wrong. The District Judge held that no appeal lay against the order of the District Munsif.

The decree-holder now appealed to the High Court.

Masilamani Pillai for appellant.

Ethiraja Mudaliar and *Sivagnana Mudaliar* for respondent.

SHEPHARD, J.—The question raised in this appeal is whether an appeal lies against an order refusing relief to a decree-holder as against the bidder at an auction sale who is alleged to have made default.

The 293rd section of the Code provides that the deficiency of price, resulting on a re-sale occasioned by the purchaser's default, shall be certified to the Court by the officer conducting the sale, "and shall, at the instance of either the judgment-creditor or the "judgment-debtor, be recoverable from the defaulter under the "rules contained in the chapter for the execution of a decree for "money."

No such certificate as the section contemplates appears to have been made. The decree-holder, alleging the bidder's default, simply asked for a warrant against the alleged defaulter. This application was dismissed by the District Munsif on the merits. On appeal being made the District Judge held that he had no jurisdiction to entertain it. The 293rd section is not one of the sections mentioned in the 588th section. The only ground, therefore, on which it can be held that an appeal lies is that orders made in respect of an alleged default by the purchaser are in the

nature of decrees, and that the parties affected must be deemed to be parties to the suit within the meaning of the 244th section. This was the view taken by the Full Bench of the Allahabad Court in a case decided with reference to the Code of 1859 and Act XXIII of 1861 (*Ram Dial* v. *Ram Das*(1)). It must be presumed that the case was present to the mind of the Legislature when the Codes of 1877 and 1882 were under consideration, and that if the decision was thought to be wrong, an alteration would have been made in the section so as to make the matter clear in the future. This has not been done. The 293rd section of the Code merely reproduces the 254th section of the Code of 1859 with immaterial variations of language. In the same Court it has also been held with reference to the 411th section of the Code that the Government, seeking to recover the amount of Court fees payable under a decree obtained by a pauper plaintiff, is placed in the position of a party to the suit, and that, accordingly, an appeal lies against an order made under that section. The language of the section is similar to that used in the 293rd section (*Janki* v. *The Collector of Allahabad*(2)). In Calcutta the precise point which now arises was in 1889 decided in favour of the appellant (*Baijnath Sahai* v. *Moheep Narain Singh*(3)). In Madras the point does not seem to have been decided in any reported case. The case of *Vallabhan* v. *Pangunni*(4) only goes to show that where the contest is between the judgment-debtor and the decree-holder who is alleged to have made default, the question between them must be treated as a question arising between the parties to the suit within the meaning of the 244th section.

As against the view above stated in favour of an appellant there is the recent case of *Deoki Nandan Rai* v. *Tapesri Lal*(5). In the judgment in this case stress is laid on the fact that, whereas the 294th section is mentioned, the 293rd section is not mentioned in section 588, and considerable weight is attached to the decision of the same Court in *Rahim Bakhsh* v. *Dhuri*(6). I am unable to admit the force of the argument suggested by the reference to the 294th section. That section contains no such language as is contained in the 293rd section, and because the Legislature thought fit to give an appeal, and that a final appeal, against orders

(1) I.L.R., 1 All., 181, 188.
(2) I.L.R., 9 All., 64.
(3) I.L.R., 16 Calc., 535.
(4) I.L.R., 12 Mad., 454.
(5) I.L.R., 14 All., 201, 208.
(6) I.L.R., 12 All., 397.

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passed under the 294th section, it does not follow that they intended orders made under the 293rd section to be final.

As to the case of *Rahim Bakhsh* v. *Dhuri*(1) it is to be observed that it turns on another section, the 315th, the language of which is in a marked way distinguishable from that used in the 293rd. In the latter section the imperative mood is used throughout, whereas in the 315th the language is permissive. The liability for the repayment of the purchase money may be enforced under the provisions of that section, or the aggrieved purchaser may recover it by suit (*Sham Karan* v. *Piari*(2)). It appears to me that no such option would be open to the judgment-creditor or judgment-debtor seeking to recover from a defaulting purchaser the loss occasioned by a re-sale. The section says distinctly that the money shall be recoverable under the rules contained in chapter XIX. In this respect the language of the 293rd section agrees with that of the 411th. If the decision already cited with regard to the latter section is correct, I fail to see why similarly, under the 293rd section, the purchaser should not be treated as a party to the suit. The effect of the whole section, as I read it, is to make the certificate of the officer conducting the sale equivalent to a decree and to put the aggrieved person and the defaulter in the position of decree-holder and judgment-debtor. Unless this construction is put upon the section, the anomaly results that in the case of the judgment-debtor complaining of default made by the decree-holder who has had leave to bid there is an appeal and a second appeal, while in the case of the creditor complaining of default made by a third person there is no appeal, and no other remedy open to the judgment-creditor.

The present case appears to me to fall within the principle of the decision of the Privy Council in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(3). There it was held that the 244th section was applicable notwithstanding that the purchaser against whom the sale was sought to be set aside had been no party to the former suit. It was observed that "Their Lordships are glad to find that "the Courts in India have not placed any narrow construction on "the language of section 244, and that when a question has arisen "as to the execution, discharge or satisfaction of a decree between "the parties to the suit in which the decree was passed, the fact

(1) I.L.R., 12 All., 397. (2) I.L.R., 5 All., 596. (3) L.R., 19 I.A., 166.

"that the purchaser who is no party to the suit is interested in "the result has never been held a bar to the application of the "section." Here I conceive there can be no doubt that the question is one relating to the execution, discharge or satisfaction of a decree.

Holding, therefore, that an appeal does lie against an order passed under section 293, I would reverse the order of the Lower Appellate Court and remand the application for disposal on the merits. Costs to be provided for in the revised order.

BEST, J.—I concur.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

IN THE MATTER OF THE MADRAS DOVETON TRUST FUND.*

1895. September 10.

Trusts Act—Act II of 1882, *s.* 34—*Application for directions by trustees—Questions of detail and difficulty—Procedure.*

The management of the Doveton charities is vested in a committee of management, who are empowered under the trust deed to require the trustees of the funds of the charities to invest the trust funds in excess of two lakhs of rupees "in the "purchase or building of any additional land, building and premises." Certain buildings having been erected under these provisions of the trust deed were now stated to be in urgent want of repair. The current income of the charities was not sufficient to meet the cost of carrying out the repairs, and the committee of management and the trustees were agreed that a sum of Rs. 8,700 in the hands of the latter (in excess of two lakhs of rupees) should be employed in carrying out this work. The trustees now applied to the High Court under Trusts Act, section 34, for its opinion on the question whether this should be done:

Held, that the question was not one with which the Court could deal under Trusts Act, section 34.

Per curiam: I am inclined to hold that the proposed expenditure could, on the Court being satisfied of its necessity, be sanctioned, if the matter comes before it in the form of a suit in its original jurisdiction: that in the exercise of such jurisdiction the Court has power to deal with a case like this seems hardly to admit of doubt.

APPLICATION for directions under Trusts Act, section 34, by the trustees of the Doveton Trusts.

The trustees presented to the High Court the following petition:—

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* Application under Trusts Act, section 34.