

held that he is to that extent entitled to priority as against the appellant whose incumbrance is intermediate in point of time.

On the hearing of the appeal, it was argued before us that inasmuch as Subba Reddi's mortgage had become merged in the decree passed upon it and that decree had been satisfied, the intention of keeping it alive for his own benefit could not properly be imputed to the respondent. Notwithstanding the opinion to the contrary expressed in the unreported case, we are of opinion that the principle on which the respondent bases his claim to priority is not affected by the circumstance that the money advanced by him was advanced in order to pay off a mortgage debt due under a decree. It is sufficient for the respondent to show that there was a subsisting prior incumbrance; that his money was lent for the purpose of discharging it, and that it was for his benefit that that prior incumbrance should still be kept alive. It cannot be said that he had any the less a right to keep the incumbrance alive, because it had taken the form of a decree. The same thing had happened in the case of *Adams v. Angell*(1), nor can it be said in the present case that the respondent did anything which could serve to negative an intention on his part to adopt the course which it was obviously for his benefit to adopt. The appeal is dismissed with costs.

PURNAMAL
CHUND
v.
VENKATA
SUBBA-
RAYALU.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

MAMMOD (JUDGMENT-DEBTOR), APPELLANT,

v.

LOCKE AND ANOTHER (DECREE-HOLDER AND AUCTION-PURCHASER),
RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 244 (c)—Parties to the suit—
Auction-purchaser.*

Land was sold in execution of a decree of a Subordinate Court, and a sale certificate was issued. A question having subsequently arisen as to what had actually been the subject of the sale, the auction-purchaser applied to the Court, and an order was made by which the sale certificate was amended. The judgment-debtor appealed to the District Court joining the decree-holder and the auction-purchaser as respondents.

1897.
August 6.
September 2.

(1) L.R., 5 Ch. D., 645.

* Appeal against Appellate Order No. 22 of 1897.

MAMMUD
v.
LOCKE.

The appeal was dismissed on the ground that no appeal lay :

Held, that the question was not one which could be determined under Civil Procedure Code, section 244, and consequently the decision of the Lower Appellate Court was right.

APPEAL against the order of H. H. O'Farrell, District Judge of South Malabar, in Civil Miscellaneous Appeal No. 65 of 1896, affirming the order of M. Srinivasa Rau, Subordinate Judge of Cochin, dated 3rd August 1896, and made on Miscellaneous Petition No. 332 of 1896 in the matter of the execution of the decree in Original Suit No. 9 of 1895.

The facts of the case, as stated by the District Judge, were as follows :—

The municipality of Cochin lent a certain sum of money to one Kunhi to tile his house, and the latter, as security, hypothecated to the municipality the house and the paramba on which it stood. On his death defendants Nos. 1 to 4 were sued as his representatives on the hypothecation bond, and a decree was passed, which, it is said by oversight, made liable the paramba only without mention of the buildings. The paramba was brought to sale and purchased for Rs. 1,500.

The sale proclamation and the sale certificate followed the terms of the decree and made no mention of the buildings. Afterwards the auction-purchaser applied to the Court to amend the sale certificate on the ground that what was really sold was the building as well as the paramba, and the Subordinate Judge, with the consent of all parties except the present appellant (first defendant) and after taking evidence, was satisfied that what was really put up for sale and purchased, was the building as well as the paramba and amended the sale certificate accordingly. Against this order the first defendant appeals, and has made not only the plaintiff—the municipality—but the auction-purchaser a party to the appeal.

The District Judge held that the dispute was not one to which section 244 was applicable, and consequently that no appeal lay against the order of the Subordinate Judge, although the first defendant might obtain a remedy by an application for revision, and he accordingly dismissed the appeal.

The judgment-debtor preferred this appeal making the decree-holder and the auction-purchaser again parties.

Sundara Ayyar for appellant.

Subramania Sastri for respondents.

JUDGMENT.—Certain immovable property was sold by the Subordinate Court of Cochin in execution of a decree obtained by the Cochin Municipal Commissioners against the appellant upon a mortgage instrument executed by him. The sale was confirmed. But before the certificate of sale was issued, disputes arose as to whether certain buildings should be included in the certificate as part of the property sold. After hearing the auction-purchaser, the judgment-creditor and the judgment-debtor, the Subordinate Court passed an order directing that the buildings should be included in the certificate. The appellant preferred an appeal against the order to the District Court. The appeal, however, was rejected on the ground that no such appeal lay. On behalf of the appellant it was contended that the view taken by the District Court was wrong, inasmuch as the question in dispute was one which fell under section 244 of the Code of Civil Procedure.

This contention is, in our opinion, untenable. Now, if the dispute involved the question of the validity of the sale, the case would, no doubt, be governed by the ruling of the Judicial Committee in *Prosunno Coomar Sanjal v. Kasi Das Sanjal* (1). But the sale was not, and could not have been, impeached by any of the parties at the time when the order in question was passed. The dispute was, and is, as to whether, under the sale, the right to the land mentioned in the sale certificate alone passed to the auction-purchaser as the appellant contends or whether, as the purchaser contends, the right to the buildings also passed. If the former contention be upheld, the party that would be affected thereby would be the purchaser. If, on the other hand, the latter contention prevailed, it is the appellant that would suffer by such decision. In neither case, the sale itself being valid, would the judgment-creditor's rights be in any way touched. There is, therefore, in this case no question in dispute between the judgment-debtor on the one side and the judgment-creditor on the other, as urged for the appellant. The question in dispute is really one between the judgment-debtor and the purchaser only. Section 244 of the Code does not, therefore, apply, and the conclusion of the District Court is right.

The appeal is dismissed with costs.