

*Before Mr. Justice Prinsep and Mr. Justice O'Kinsaly.*

GOLAM ABED (DEBENDANT) *v.* TOOLSEERAM BERA (PLAINTIFF).<sup>\*</sup>

1883  
March 5.

*Absconding of Accused—Attachment by Magistrate—Execution of Decree—Sale in Execution of Decree—Sale by Magistrate—Code of Criminal Procedure, (Act X of 1872), ss. 172, 173.*

*A*, having been accused of an offence under the Indian Penal Code, absconded, and his property was on the 7th of August 1878 attached by the Magistrate under s. 172 of the Code of Criminal Procedure, Act X of 1872. While the property was so under attachment, it was attached by *B* in execution of a money-decree against *A*, and sold on the 15th of January 1879, *B* being the purchaser. On the 21st of April 1880, the Magistrate sold the property to *C*. It did not appear whether the time fixed by the Magistrate's proclamation for *A*'s appearance had expired at the date of the sale to *B*.

*Held*, in a suit for possession by *B* against *C*, that the title obtained by *C* under the Magistrate's sale was superior to the title (if any) obtained by *B* at the sale in execution of the money-decree.

*Semble*, that after the date of the attachment by the Magistrate under s. 172 of the Code of Criminal Procedure and during its continuance, no title could be conferred by an attachment and sale subsequently made in execution of a money-decree.

THIS was a suit for possession of certain plots of land. The judgment appealed from was as follows :—

It appears that the property in dispute belonged to two brothers, Boidonath and Kasinath, who had equal shares in it. Boidonath, who was accused of an offence under the Penal Code, absconded, and the property in dispute was attached by the Magistrate on the 11th of August 1878, under s. 172 of the Civil Procedure Code. During the subsistence of this attachment the plaintiff (respondent) attached the property for debts due, from both Boidonath and Kasinath, and sold and purchased it himself on the 15th of January 1879. The Magistrate then subsequently sold the right, title and interest of Boidonath (which was only a moiety share), and the appellant (Sheik Golam Abed) purchased it on the 21st of April 1880. The question is whether the plaintiff's purchase of Boidonath's share can be held good after the attachment made by the Magistrate under s. 172

<sup>\*</sup> Appeal from Appellate Decree No. 952 of 1882, against the decree of Baboo Jodunath Roy, First Subordinate Judge of Midnapore, dated the 24th March 1882, affirming the decree of Baboo Juggodishur Gupto, Munsiff of Newal, dated the 31st December 1880.

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of the Criminal Procedure Code. It was contended that after attachment by the Magistrate the property should be considered to have been at the disposal of the Government, and, therefore, the plaintiff had no right to attach and sell it in execution of his decree. Reading s. 172, it appears to me that the property which was attached was not to be considered at the disposal of Government as soon as it was attached, but when the time specified in the proclamation for the absent person to appear expired.

In this case it does not appear whether the time fixed for Boidonath's appearance expired before or after the plaintiff's sale, and, therefore, I cannot say that the property was at the disposal of Government at the time when the plaintiff purchased it. The defendant ought to have shewn that a proclamation was issued before the plaintiff's purchase, and that the time specified in it for Boidonath's appearance expired before the plaintiff's purchase. I think, therefore there is no ground for interfering with the lower Court's judgment, and therefore it is dismissed with costs.

The defendant appealed to the High Court on the grounds (1), that nothing passed to the plaintiff at his sale; (2), that the defendant was entitled to priority over the plaintiff; (3), that the lower Court misconstrued s. 172; (4), that the lower Court was wrong in holding that the defendant was bound to show that a proclamation had issued before the plaintiff's purchase.

*Moonsbi Serajul Islam* for the appellant.

No one appeared for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The property, which is the subject of the present appeal, was attached by the Magistrate under s. 172 of the Code of Criminal Procedure (Act X of 1872), in consequence of the proprietor Boidonath Dutt absconding when accused of committing a criminal offence. The date of the attachment is stated to be the 7th of August 1878. Subsequently a third person, who held a decree against Boidonath Dutt, proceeded to execute it, and attached the same property, which was sold to the plaintiff on the 15th of January 1879. Notwithstanding these proceedings the attachment under the order of the Magistrate still continued, and it appears that, as Boidonath Dutt did not appear within the period specified in the proclamation issued under s. 171, the pro-

erty at once became (to use the terms of s. 172) "at the disposal of Government." We understand by this expression that it came under the absolute control of Government to dispose of, or deal with it, in whatever manner might seem most appropriate and convenient. In April 1880, the Magistrate at a public sale sold the rights of Government to the defendant. We have therefore in the present suit to determine which of these sales conferred the title to this property.

The Subordinate Judge has given the plaintiff a decree as against the defendant, because in his opinion the defendant ought to have shown that the proclamation had issued before the plaintiff's purchase, and that the time specified in it for Boidonath's appearance expired before the plaintiff's purchase.

These reasons appear to us to be altogether unsound, for the Subordinate Judge should have presumed in accordance with s. 114 (e) of the Evidence Act that the judicial acts of the Magistrate were regularly performed, that is to say that, unless the contrary was shown, the proclamation under s. 171 had been properly issued; that Boidonath did not appear within the time specified in the proclamation; and that the property having become at the disposal of Government, the Magistrate transferred it to the defendant. As regards the title of the defendant it appears to us that, so long as the attachment by the Magistrate continued, no title could be conferred by any attachment subsequently made. Section 172 provides that if the person to whom the property belongs does not appear within the specified period, his property (not his right, title and interest) shall be at the disposal of Government, and from the terms of s. 173 it would appear that if the property has been sold, although the person to whom it belonged might be able to show to the satisfaction of the Magistrate that he was not at fault, and therefore not properly responsible for the sale, even then the sale is not to be set aside, and the property restored, but the proceeds of the sale are to be made over to the proprietor.

Under these circumstances the suit must be dismissed, the orders of the Courts below being set aside with costs in all the Courts.

*Appeal allowed.*

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