

and sections 146 and 147.) We are therefore inclined to hold that section 69 does not apply to a suit for contribution at all. The result is the appeal is dismissed with costs.

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MA ARAI.
WALLIS, C.J.

WALLIS, C.J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

PARVATHI AMMAL (APPELLANT IN SECOND APPEAL
No. 1127 AND RESPONDENT IN SECOND APPEAL
No. 1147 OF 1914), DEFENDANT,

1915.
August
16 and 26.

v.

297. L. J 467

GOVINDASAMI PILLAI (RESPONDENT IN SECOND APPEAL
No. 1127 AND APPELLANT IN SECOND APPEAL
No. 1147 OF 1914), PLAINTIFF.*

Execution sale set aside for irregularities of decree-holder—Right of purchaser to return of poundage fees and to interest on purchase money—Right of suit—Civil Procedure Code (Act V of 1908), O. XXI, r. 93, no bar by.

A Court-sale was set aside on account of irregularities in its conduct, perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of the poundage fees not returned to him and interest on the purchase money paid by him.

Held (overruling the objection that remedy for the return of the poundage fees lay only in execution), that a suit was maintainable for the recovery of the same.

Powell v. Powell (1875) 19 Eq., 422, followed.

The poundage fee is really part of the purchase money paid.

Held also, that the purchaser was entitled to interest on the purchase money paid by him.

Raghubir Dayal v. The Bank of Upper India, Ltd. (1882) I.L.R., 5 All., 364, followed.

SECOND APPEALS against the decree of G. KODANDARAMANJULU NAYUDU, the Subordinate Judge of Tanjore, in Appeals Nos. 690 and 718 of 1912, respectively, preferred against the decree of P. C. THIRUVENKATA ACHARIYAR, the District Munsif of Tanjore, in Original Suit No. 271 of 1911.

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The facts of the case appear from the judgment.

Second Appeal No. 1127 of 1914.

K. S. Ganapati Ayyar for the appellant.

G. S. Ramachandra Ayyar for the respondent.

Second Appeal No. 1174 of 1914.

G. S. Ramachandra Ayyar for the appellant.

K. S. Ganapati Ayyar for the respondent.

SPRINGER AND
SESHAGIRI
AYYAR, JJ.

The following judgment of the Court was delivered by
SESHAGIRI AYYAR, J.—The facts of the case are not in dispute.
The defendant obtained a decree against certain persons.
Immoveable properties were sold under that decree and the
plaintiff became the purchaser. At the instance of the judg-
ment-debtors the sale was set aside on the ground of irregulari-
ties in the conduct of the sale. Plaintiff, the purchaser, sued to
recover the amount of the poundage fees deducted from the
purchase money paid by him, and also interest. The claim for
vakils' fees, etc., has not been pressed before us. The District
Munsif held that plaintiff was entitled to interest at 6 per cent,
and that a separate suit would not lie to recover poundage. Both
the parties appealed. The Subordinate Judge held that the
claim for poundage was sustainable, but that interest should not
have been decreed. Second Appeal No. 1127 of 1914 is by the
defendant against the decree for poundage. Second Appeal
No. 1147 of 1914 is by the plaintiff for the interest disallowed.

Before dealing with the question of law argued before us, we
may state that we see no reason to differ from the conclusion of
the Courts below that defendant is responsible for the irregulari-
ties in the conduct of the execution sale. In the order passed
on the application of the judgment-debtor, the Subordinate
Judge held that the decree-holder was responsible for the mate-
rial irregularity in the publishing or conducting the sale." (See
paragraph 9 of the District Munsif's judgment.) The District
Munsif in the present suit came to the same conclusion; appa-
rently the liability of the defendant was not disputed in appeal.
It is true the Court in ordering the sale of the property should
have directed the amin to sell the property in different lots, but
that would not absolve the defendant from his liability. The
responsibility of the officer levying execution in the mufassal is

not like that of the Sheriff in England. It is the duty of the decree-holder to put the Court in possession of the necessary information and to attend to the various requirements of the law in publishing and conducting the sale. The Court cannot be proceeded against for the irregularity in execution, if it acted to the best of its information and without malice. The party who puts the Court in motion is liable to the purchaser who has been aggrieved. Even in Sheriff's sales, the purchaser is entitled to proceed against the decree-holder. In *Dorab Ally Khan v. Abdool Azeez*(1) in which the Judicial Committee had to pronounce upon the liability of the Sheriff who executed a decree of the Original Side of the Calcutta High Court, it was pointed out that the Sheriff may render himself liable if he seized the property situated beyond his territorial jurisdiction or if he exceeded the powers expressly conferred on him by the statute. Their Lordships have also laid down that where the Sheriff acts under the advice and guidance of the execution creditor, the latter will be responsible to the purchaser. The present is an *a. fortiori* case.

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The main question argued related to the maintainability of the suit. Mr. Ganapati Ayyar contented that the plaintiff should have sought redress in execution and that a separate suit did not lie. Section 315 of Act XIV of 1882 provided for two classes of cases: (1) where the sale has been set aside as provided for in the Code and (2) where it was found that the judgment-debtor had no saleable interest in the property sold. The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase money without applying to set aside the sale when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be as suggested by Mr. Ramachandra Ayyar for the respondent that unless the purchaser seeks the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the Judicial Committee in *Dorab Ally Khan v. Abdool Azeez*(1) that there was no warranty of title in Court-sales: see also *Sundara Gopalan v. Venkata Varadaiyanagar*(2). The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is the creature of a statute, and the right thus conferred

(1) (1878) I.L.R., 3 Cal., 806 (P.O.).

(2) (1894) I.L.R., 17 Mad., 228.

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can only be exercised within the limitations prescribed. Consequently without getting the sale aside through Court, the purchaser has no right of action. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given to him by the statute. But the right to recover from a party whose fraud or carelessness has led to the invalidity of the sale stands on a different footing. In such cases by neglecting the duty cast on him, he renders himself liable to compensate the injured party for the loss the latter has sustained. This right is not created for the first time by the statute. The Code only recognized what has existed all along. As stated by Sir JAMES BACON (Vice-Chancellor) in *Powell v. Powell*(1) the purchaser is entitled under these circumstances to be discharged from his contract by reason of the invalidity of the proceedings which led up to the sale and is entitled to be placed in *status quo ante*. The same proposition is stated in 24 Cyclopaedia of Law and Procedure, 70, thus: "It is generally held that when the proceedings are invalid, so that the purchaser loses the land, title to which he would have had but for the defects in the proceedings, he is entitled to recover back the purchase-money paid by him, and to be reimbursed for money expended by him for taxes and on repairs and improvements that have increased the value of the land." The decision in *Mohideen Ibrahim v. Mahomed Meera Levai*(2) on which the appellant relied strongly, does not touch the present question. Mr. Justice NAPIER held in that case that where the purchaser was deprived of his possession by reason of a decision in a subsequent suit he is not entitled to sue for the return of the purchase-money. The omission from the Code of 1908 of the clause relating to the want of "saleable interest" in the judgment-debtor is relied on strongly by the learned Judge. In the present case the sale has not become abortive owing to the want of saleable interest in the judgment-debtor. Mr. Ganapati Ayyar contended that the words of section 315 of Act XIV of 1882 "that the purchaser shall be entitled to receive back his purchase money" may confer a right of suit as held in numerous cases, but that the words "shall be entitled to an order for repayment" in rule 93 indicates a deliberate policy to restrict the remedy to execution in all cases

(1) (1875) 19 Eq., 422.

(2) (1912) 23 M.L.J., 487.

of sales being set aside. We are unable to see the distinction. There are no words in the present Code as in the Code of 1882, enabling the purchaser to realize his money by way of execution. Further he is no party to the suit or the decree. Unless, therefore, his right of action is taken away by express words, he is entitled to pursue his ordinary remedy by filing a suit.

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Another contention of the appellant was that as poundage is taken by the Court, the decree-holder is not bound to pay it to the purchaser. This argument proceeds on a misconception of the nature of the poundage fees. As was pointed out by Mr. Ramachandra Ayyar in his able argument, what the purchaser claims is really a portion of the purchase-money. It is from the payment made by him the Court makes a deduction for poundage and pays the balance to the decree-holder. Poundage is the fee which is levied in England by the Sheriff as remuneration for his service. In this country, as the officers of the Court conducting the sales are paid a fixed salary, a certain percentage of the purchase-money is taken for purchasing stamps. In effect the fee is a charge paid by the decree-holder for the services he obtains from the Court. In England as well as in this country, this fee is taken out of the sale-proceeds. See paragraph 71 in 14 Halsbury's Laws of England and rule 154 of the Civil Rules of Practice. There is therefore no warrant for the suggestion that in claiming the money retained as poundage fees, the purchaser does not ask for the return of the purchase-money. Nor do we see any reason to assent to the argument that the claim for the recovery of such fees should be disposed of in execution. The omission of the word "poundage" in rule 157, clause (2), was much relied on. This omission cannot affect the substantive right of suit which the purchaser has. It was held in *Rawstorne v. Wilkinson*(1) that the Sheriff has a right of action to recover poundage fees where the sale proves abortive. See also *Tyson v. Paske*(2). The auction-purchaser whose money has been paid by way of poundage to the Sheriff will stand in his shoes to recover it against the execution creditor. The fact that it is retained by the Court can make no difference in principle. We have therefore come to the conclusion that the Subordinate

(1) (1816) 4 Maule & Selwyn, 256.

(2) (1705) 2 Lord Raym., 1212; s.c. 92 E.R., 300.

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Judge was right in holding that the suit is not obnoxious to the execution provisions of the Code of Civil Procedure. We dismiss Second Appeal No. 1127 of 1914 with costs.

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ATTYAR, JJ.

We are, however, unable to agree with the lower Appellate Court that the purchaser has lost his right to interest by any laches on his part. He is under no duty to see that the property is put up for sale in separate lots. He is not affected by any anterior mismanagement in the conduct of the sale. He has to take the property as advertised and sold. As he paid the money required by law, there is no reason for depriving him of the interest on his money. See *Raghubir Dayal v. The Bank of Upper India, Limited*(1). The rate of interest awarded by the Munsif is correct. We must reverse the decree in Second Appeal No. 1147 of 1914 with costs in this and in the lower Appellate Court, and give a decree for Rs. 306 with interest at 6 per cent from the date that the plaintiff deposited the money into Court.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

M. RAMACHANDRA RAO (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

REPRESENTED BY THE COLLECTOR OF GODAVARI
(DEFENDANT), RESPONDENT.*

Madras Village Courts Act (I of 1889), sec. 24—Order of Deputy Collector debarring one from appearing as vakil for parties in village courts, ultra vires—Specific Relief Act (I of 1877), sec. 42—Suit for declaration of invalidity of order, maintainability of.

Under section 24 of the Madras Village Courts Act (I of 1889), any person holding a vakalatnama from a party may appear and plead in a village Court, and there is no provision in the Act for debarring any one from this privilege. The power of removing, suspending and dismissing village munsifs conferred on

(1) (1883) I.L.R., 5 All., 364.

Second Appeal No. 1635 of 1914.