

## CRIMINAL REFERENCE.

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

IN THE MATTER OF GAMIRULLAH SARKAR.

GAMIRULLAH SARKAR v. ABDUL SHEIKH.\*

1884  
February 25.

*Magistrate, Jurisdiction of Summary Trial—Criminal Trespass—Mischief—  
Penal Code, s. 427—Code of Criminal Procedure (Act X of 1882)  
s. 260.*

A person may be tried summarily for criminal trespass and mischief unless there is a *bonâ fide* claim of right depriving the Magistrate of jurisdiction. *Shakur Mahomed v. Chunder Mohun Sha* (1) disapproved.

In this case the accused were sentenced to three months' rigorous imprisonment by a Bench of Magistrates. The Sessions Judge of Rungpore transmitted the record to the High Court under s. 438 of Act X of 1882, with the following report:—

"The complaint was one of criminal trespass and mischief. The accused were charged with destroying some *kalai* belonging to complainant, partly by turning their cattle into it, and partly by ploughing it up. They set up a claim to the land, which they said they held under a third party. The case was tried summarily and the accused sentenced to three months' rigorous imprisonment. The judgment appears to rest principally on two documents referred to in it, which are not evidence against accused at all, the one marked A being a copy and not admissible till the original is accounted for, and the one marked B being a decree between complainant and a third party. The Deputy Magistrate, in his explanation herewith appended, says that there was other evidence besides these documents. In that case the judgment is bad for not recording the valid reasons, if there were any, for the conviction.

"Besides this, the case, it seems to me, is not one which should have been tried summarily—*Shakur Mahomed v. Chunder Mohun Sha* (1), and *In the matter of Issur Chunder Mundle* (2). I therefore recommend that this conviction be quashed, and that, if the Court think fit, the case be sent back to be retried by the ordinary procedure."

The District Judge admitted the accused to bail, stating that more than half the sentence had then expired. The Deputy Magistrate in the explanation forwarded by him to the Sessions Judge said, with regard to (1) the evidence on which the accused were convicted, and (2) the summary procedure adopted in trying the accused.

"With regard to (1) I most humbly beg to submit that the Bench of Magis-  
\* Criminal Reference No. 15 of 1884, and letter No. 77, from the order made by J. R. Hallett, Esq., Sessions Judge of Rungpore, dated the 18th February 1884.

(1) 21 W. R. Or., 38.

(2) 25 W. R. Or., 65.

trates did not convict the accused solely on the strength of the two documents mentioned in the judgment. Independent witnesses were examined from both sides, and the two documents have been mentioned simply as corroborative evidence for believing one set of witnesses in preference to the other. The Bench did not say that Mahabut Ali or the accused were bound by the decree of the Civil Court, but as the matter was once adjudicated by the Civil Court, no one had a right to disturb the order of the Civil Court. If any party was aggrieved his remedy lay in moving the Civil Court and getting its order set aside by the same or any superior authority, and not to try himself to make order of the Civil Court inoperative. A Criminal Court is bound to accept the person put in possession by order of the Civil Court as being really in possession of that property.

"With regard to point (2) I beg to submit that I have not with me the Weekly Reporter and cannot therefore say what impediment there is in this case being tried summarily. When a person has been once put in possession of certain landed property by order of the Civil Court, the Bench believed that no private person had any right to dispossess him of it, but any person aggrieved by the order might either prefer a claim or bring a regular suit for getting the order set aside. Every man's property would be at the mercy of his rich opponent if for every act of aggression he is compelled to seek the assistance of the Civil Court, for which reason the Bench believed that the Criminal Court would be justified in interfering in such cases."

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

PRINSEP, J.—The petitioners have been convicted in a summary trial of mischief and criminal trespass.

The Sessions Judge has submitted the proceedings in order that the conviction and sentence may be quashed. First, because "the judgment appears to rest principally on two documents referred to in it, which are not evidence against the accused at all." This objection however is effectually disposed of by the fact that there is ample legal evidence, and therefore, under s. 167 of the Evidence Act, we cannot interfere.

The Sessions Judge next relies on the cases of *Shakur Mahomed v. Chunder Mohun Sha* (1) and *Issur Chunder Mundle v. Rohim Sheikh* (2). With regard to the first case, we would refer to the case of *Sonai Sardar v. Bukhtar Sardar* (3) explaining it as no authority for the proposition quoted, and with regard to the other case, we would remark that the present case cannot be regarded as a *bona fide* claim of right depriving the Magistrate of jurisdiction, so that the case quoted is not in point. We therefore see no reason to interfere.

(1) 21 W. R. Cr., 38. (2) 25 W. R. Cr., 65. (3) 25 W. R., 46.

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ABDUL  
SHEIKH.

## APPELLATE CIVIL.

Before Mr. Justice Maclean, and Mr. Justice Norris.

1884  
January 25.

BALLODEB LALL BHAGAT (DECREE-HOLDER) v. ANADI MOHA-PATTUR AND OTHERS (JUDGMENT-DEBTORS).\*

*Appeal—Order in execution of decree—Fraud—Cancellation of sale in execution of decree—Civil Procedure Code (Act XIV of 1882) ss. 2, 244 cl. (c) 311 and 588 cl. 16.*

Where it was shown that a judgment-creditor was himself the purchaser at an execution sale, and the amount for which he so purchased the property of his judgment-debtor was set off against the amount due to him under his decree, and where on the application of the judgment-debtor the Court passed an order setting aside the sale on the ground of fraud practised by the judgment-creditor on the judgment-debtor in connection with the sale in consequence of which fraud the property had been sold at an undervalue, *Held*, that inasmuch as the order involved the decision of a question between the parties to the suit relating to the execution, discharge, on satisfaction of the decree; (the decree having been satisfied as far as the purchase money bid by the decree-holder went, and the order cancelling that *pro tanto* satisfaction), though not appealable under the provisions of s. 588, cl. 16 was appealable as a decree under the provisions of the Code of Civil Procedure (Act XIV of 1882) s. 2, and s. 244, cl. (c).

THIS was an appeal from an order setting aside a sale on the ground of fraud practised by the judgment-creditor, who was himself the purchaser, in agreeing with the judgment-debtor to give him further time to discharge the debt and then bringing on the sale in violation of that agreement.

The judgment-debtor in his application to the Original Court also applied to have the sale set aside under the provisions of s. 311 of the Civil Procedure Code (Act XIV of 1882), on the ground of material irregularities in publishing and conducting the sale, but that Court decided that no such irregularity was proved to have occurred. The Subordinate Judge, however, held that fraud had been practised by the decree-holder, and relying on the decision in *Subaji Rau v. Srinivasa Rau* (1) set aside the sale.

The decree-holder accordingly appealed to the High Court.

\* Appeal from Original Order No. 271 of 1883, against the order of F. W. Wright, Esq., Subordinate Judge of Cuttack, dated the 16th May 1883.

(1) I. L. R. 2 Mad., 264.

Mr. Pugh, Baboo Hem Chunder Banerji and Baboo Nilmadhub Sen appeared on behalf of the appellant.

Baboo Chunder Madhub Ghose, Baboo Ambica Churn Bose and Baboo Koruna Sunker Mookerjee for the respondents.

The judgment of the Court (MACLEAN and NORRIS, JJ.), which sufficiently states the facts for the purpose of this report, was delivered by

MACLEAN, J.—This appeal has been made under the following circumstances:—

The appellant is the judgment-creditor and purchaser at an execution sale which was concluded on 31st January 1882. He purchased the property for Rs. 2,700 and the amount was set off against the amount due under the decree.

The judgment-debtor (respondent,) applied to the Court to set aside the sale under s. 311 of the Civil Procedure Code on the ground of material irregularities in publishing or conducting it. He alleged that the requisite notices had not been published, and also that the decree-holder, appellant, had agreed to give him further time to discharge the debt, and had brought on the sale in violation of that agreement.

The Subordinate Judge decided that no irregularity was proved to have occurred, but considering that the decree-holder was proved to have practised a fraud upon the debtor in bringing on the sale after agreeing to give further time he set aside the sale. He quoted *Subbaji Rau v. Srinivasa Rau* (1), in support of this course.

This case shows that there is no specific provision in the Code, and that none is required authorizing the Court to set aside a sale under the circumstances stated above. It is, however, authority for another proposition, and that is for holding that there is no appeal against such an order.

It cannot be said that the order setting aside a sale, not made under the second paragraph of s. 312, but under the general power of the Court to check fraud, is appealable under the provisions of s. 538 (16), but it has been argued that the case is well within the terms of s. 244 (c), viz., that there was a ques-

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(1) I. L. R., 2 Mad., 204.

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tion (1) between the parties to the suit, (2) relating to the execution, discharge or satisfaction of the decree. If this contention is correct the order setting aside the sale is undoubtedly appealable as being a decree. (See s. 2, Civil Procedure Code.)

On the other hand it was urged that the question did not relate to the execution, discharge, or satisfaction of the decree. Even if it should be held that the execution proceedings were closed by the sale, and that the confirmation or setting aside of the sale did not relate to the execution of the decree, a proposition against which *Viraraghava Ayyangar v. Venkatacharyan* (1) is authority, it seems to be difficult to arrive at the conclusion that the partial discharge or satisfaction of the decree was not effected by the order setting aside the sale. The decree was *pro tanto* satisfied by the amount of the appellant's bid having been set off against the amount due from the respondent. The order now appealed against cancelled that *pro tanto* satisfaction, and it, therefore, appears to us that this order related both to the execution as held in *Viraraghava Ayyangar v. Venkatacharyan* (1) and to the satisfaction of the decree. In this view of the case the appeal has been properly preferred to this Court. We do not find that the effect of s. 244 on the right of appeal was discussed in the case of *Sabbaji Rau v. Srinivasa Rau* (2) already referred to. We think, however, that the case of *Luchmeeput Singh v. Sita Nath Dass* (3) quoted by the appellant's counsel supports this view.

Upon the merits of the case we are unable to agree with the Court below. Apart from the question whether an agreement between the parties not brought to the notice of the Court can be recognized in the face of the provisions of s. 257 (a) of the Code, we are obliged to hold that the evidence does not establish any agreement at all. At most it gives rise to a suspicion that there were a sort of promise on the part of the appellant that if he paid a certain sum of money which was not paid to him he would not press on the sale. On the other hand there is no evidence as to when this promise was made, and as we find that the sale commenced on the 21st January 1882, and was continued

(1) I. L. R., 5 Mad., 217. (2) I. L. R. 2 Mad., 264. (3) I. L. R., 8 Calo., 477.

almost daily till its conclusion on the 31st idem, there would seem to have been no curtailment of the four days said to have been the period for which appellant agreed to wait for the promised payment.

We must, therefore, reluctantly say that no irregularity having been found to have taken place, a finding not impugned in appeal the lower Court's order setting aside the sale is not justified by the evidence. We accordingly decree this appeal with costs. The sale must be confirmed.

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*Appeal allowed.*

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

SURBOMONGALA DASSI (PLAINTIFF) v. SHASHIBHOOSHUN  
BISWAS (DEFENDANT).\*

1884  
February 8.

*Probate—Application for Probate—Caveat—Mortgagee—Attaching  
Creditor—Fraud.*

A mortgaged certain property to *B*, who obtained a decree on his mortgage on the 20th of August 1881. In execution of this decree *B*, on the 5th of September 1881, attached the mortgaged property and obtained an order for sale. On the 14th of September 1881, the wife of the mortgagor applied for probate of the will of one Thakomoni Dassi, the mother of the mortgagor who had died on the 16th of May 1881. The testatrix, by her will, left all her property to the mortgagor's wife. The mortgaged property was included in the property dealt with by the will. *B*, the mortgagee, entered a *caveat* against the grant of probate, alleging that the will was a forgery, got up by the mortgagor for the purpose of saving the mortgaged property from being sold in execution of a decree against himself.

*Held*, that *B* was entitled to enter a *caveat*.

THIS was an application for probate which was made in the Court of the Judge of the District of the 24-Pergunnahs on the 14th of September 1881 by Surbomongala Dassi. The applicant stated that she was the wife of one Bhagabati Churn Nag, who was the son of Thakomoni Dassi; that Thakomoni Dassi died on the 16th of May 1881 having previously, on the 12th of May 1881, made and published her last will and testament, whereof she appointed the applicant sole legatee and executrix. It was of this will that Surbomongala Dassi applied for probate. A general

\* Appeal from Original Decree No. 50 of 1882, against the decree of W. Macpherson, Esq., Judge of 24-Pergunnahs, dated the 31st December 1881.