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of those rights. The fact of the plaintiff going before the Magistrate is the strongest possible proof that he at once asserted his right; and the fact of the obstruction being removed, and of the plaintiff's subsequent user of it without further objection by Sherif Hossein, shows plainly that he was successful in the assertion of his claim.

The cutting of the ditch by the Government, which is relied on by the Subordinate Judge in support of his view, might have been a slight inconvenience to the plaintiff, but certainly did not operate to prevent his user. The ditch appears to have been dug not with a view to obstruct the plaintiff, but to mark out the land which the Government had purchased; and it appears that after it was dug the plaintiff used the way as before, merely fixing a pole in the middle of the ditch, that he might swing himself over it more easily.

The case must, therefore, go back to the Court of first instance to consider whether there is any sufficient reason in point of law why the defendant's building should not be pulled down, and the defendant will probably do wisely under the circumstances to come to some reasonable arrangement.

The plaintiff having succeeded in establishing his right of way is entitled to his costs in all the Courts.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

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MINA KUMARI BIBEE (DEFENDANT) v. JAGAT SATTANI BIBEE AND OTHERS (PLAINTIFFS.)*

Sale in execution of decree—Sale afterwards set aside—Execution of decree found to be barred by limitation—Suit to recover the property from purchaser.

A creditor obtained a decree against his debtor, and applied for and obtained an order for execution. This application was unsuccessfully opposed by the judgment-debtor on the ground that execution was barred by limitation. Certain properties of the judgment-debtor were attached and sold in execution of this decree, the judgment-creditor himself becoming the purchaser.

* Appeal from Original Decree No. 127 of 1882, against the decree of Baboo Amrit Lall Chatterjee, Subordinate Judge of Nuddea, dated 20th March 1882.

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In due course, the sale was confirmed, and a certificate granted to the purchaser. Subsequently to this, the order granting execution came up before the High Court on appeal, and that Court decided that execution was barred. The person who had been the judgment-debtor then brought a regular suit against the purchaser to recover the properties sold in execution.

Held, that he was entitled to have the sale set aside by regular suit.

Jan Ali v. *Jan Ali Chowdhry* (1) distinguished.

ONE Dhunput Singh, on the 9th July 1867, obtained a money decree against Jagat Sattani Bibee and assigned the decree to his wife. On the 23rd July 1867 an application for execution was made, which was opposed on the ground that execution was barred; the application was, however, granted, and subsequently the decree was transferred to another district for execution, and certain properties of the judgment-debtor (the subject of the present suit) were attached and put up for sale, and were purchased by one Baranasi Roy in the name of the wife of Dhunput Singh. Subsequent to the execution sale, the question as to whether execution was barred, came up before the High Court on appeal, and that Court, on the 29th November 1880, decided that the application for execution made on the 23rd July 1873 was barred by limitation. Previously to the decree of the High Court, dated 29th November 1880, the execution sales were confirmed by the District Judge of Nuddea, and a certificate had been granted to the purchaser.

Jagat Sattani Bibee then brought this present suit against Dhunput Singh and his wife, to recover possession of the properties sold in execution as above stated, alleging that the decree of 1867 was fraudulent, that the transfer to Dhunput Singh's wife was *benami*, and that as execution was barred when the sales were held, nothing passed to the purchaser.

The wife of Dhunput Singh, the second defendant, contended that the order of the High Court on the question of limitation had not become final, as a review was pending on that order, that she was not a *benamidar* for her husband, and that if the sales were void, the application for restoration of the properties ought to have been made to the Court that made the sale.

(1) 1 B. L. R. A. C., 56; 10 W. R., 154.

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Dhunput Singh denied that the purchase by his wife had been made for his benefit.

The Sub-Judge held that execution of the decree being barred, the sale under it and purchase by the judgment-creditor would not pass anything to the defendants, and that the plaintiff was in order in bringing a regular suit, as the question raised in the suit was not one relating to the execution or discharge of satisfaction of the decree, and therefore gave a decree in favour of the plaintiff for possession.

The defendants appealed to the High Court.

Baboo *Gurodass Banerjee* and Baboo *Srinath Doss* for the appellants, contended that, although the plaintiff might be entitled to have the purchase-money paid to her, she was not entitled to set aside the sale, and cited *Jan Ali* v. *Jan Ali Chowdhry* (1).

Munshi *Mahomed Yusuf* for the respondent.

The judgment of the Court (GARTH, C.J. and MACPHERSON, J.) was delivered by

GARTH, C.J.—We think that the Court below was quite right.

It is not necessary for us to deal with any other than that which is the principal question in the case, namely, whether the sale, which took place under the execution proceedings in the former suit, can be set aside by the plaintiff in this suit.

She (the present plaintiff) was the judgment-debtor in the former suit, and before the execution issued under which the sale took place, she took the objection that the right to issue execution was barred by limitation.

The Court held that execution was not barred, and consequently the sale took place, and was confirmed to the present defendant.

The plaintiff, the execution-debtor, then appealed to the High Court. The High Court held that the Court below was wrong, and that the right to issue execution was barred. The decision has been since approved by the Privy Council.

The plaintiff then brought this suit for the purpose of having it declared that the sale was invalid.

(1) 1 B. L. R. A. C. 56; 10 W. R. 154.

The Court below has given the plaintiff a decree to the effect, but it has been contended before us in appeal that, although under the circumstances the plaintiff may be entitled to have the purchase-money paid to her, she is not entitled to set aside the sale; and in support of that contention we are referred to a case decided by Sir Barnes Peacock and the late Mr. Justice Mitter—*Jan Ali v. Jan Ali Chowdhry* (1).

In that case a sale had taken place under a decree at the time when the decree was valid, and the decree-holder had a perfect right to issue execution under it. But the decree was subsequently reversed on appeal, and it was then contended that the sale itself, which had been made to a *bonâ fide* purchaser for value, could not stand. But the Court there held that, as when the sale took place, the decree was good and the execution proceedings were perfectly regular, the sale could not afterwards be set aside as against a *bonâ fide* purchaser for value.

That case is distinguishable from the present upon two grounds.

In the first place an objection was raised in this case in due time that the right to issue execution was barred; and as it was afterwards held in appeal that the objection was a valid one, it follows that the sale took place under circumstances which showed that it was illegal.

But in the next place there is this very material difference between the two cases. In this case it cannot be said that the sale was made to a *bonâ fide* purchaser for value without notice; because the execution-creditor was himself the purchaser. He was perfectly aware of the objection which had been taken, and he also knew that, if that objection were valid, the execution would be contrary to law. Notwithstanding this, he insisted on pressing on the sale, and was himself the purchaser. He, therefore, bought with full notice that his title might turn out to be invalid, and we think he must take the consequences of his imprudence.

We find that in the case referred to in the lower Court's judgment, *Mahomed Hossein* v. *Kokil Singh* (2), we carefully abstained from giving any opinion as to whether under circum-

(1) 1 B. L. R. A. C. 56: 10 W. R. 151.

(2) I L. R. 7 Calc., 91

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stances somewhat similar to the present, the judgment-debtor could have set aside the sale by means of a regular suit.

That question has now arisen, and we think it only just that the sale should be set aside. It seems to us that, if after the objection had been properly taken, the judgment-debtor could not set aside the sale as against the execution-creditor, the appeal to the High Court, though successful, would virtually be infructuous.

It is perfectly true that the execution-purchaser had a right, if he chose, to insist upon the sale taking place; but if he adopted that course, he did so at the risk of the sale being set aside.

We think, therefore, that the appeal should be dismissed, and the appellant must pay the costs of this appeal as well as of the Court below.

Appeal dismissed.