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The question thus raised is one of some importance, and, having regard to the precedents already enumerated, we thought it right to take time to consider judgment. The point turns upon the construction of the words "subject-matter in dispute" of s. 22, Act VI of 1871.

In the present case the plaintiffs' suit was essentially one for redemption of mortgage, the court-fee payable on which would have to be calculated according to the "principal money expressed to be secured by the instrument of mortgage,"—Art. ix, s. 7 of Court Fees' Act. It is true that the defendants by their pleas opened up a wider field for inquiry, involving the consideration of their proprietary title to the property. But we do not think that the character or nature of the subject-matter of the plaintiffs' claim was thereby altered; it continues in its original shape so far as he is concerned, nor is the complexion of it entirely changed because the defendants put forward certain grounds of defence which, if well-founded, must defeat his right to redeem. We therefore think that the subject-matter in dispute was the mortgage and the mortgagee's right under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the Judge. We regret that the decision should be directly at variance with the judgment of Turner and Spankie, JJ., already mentioned, but the point appears to us so clear, that we feel constrained to differ from the view enunciated by those two learned Judges.

The memorandum of appeal will be returned to the appellant for presentation in the proper Court and the appellant will pay the respondents' costs in this Court.

Order accordingly.

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March 23.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HIRA LAL (DEFENDANT) v. KARIM-UN-NISA (PLAINTIFF)*.

Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—Act VIII of 1859 (Civil Procedure Code), ss. 256, 257, 258—Act X of 1877 (Civil Procedure Code) ss. 312, 315—Warranty—Caveat emptor.

Certain immoveable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, H, as the property

* Second Appeal, No. 883 of 1879, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 26th May, 1879, affirming a decree of Mir Anwar Hussain, Munsif of Moradabad, dated the 26th November, 1876.

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of his judgment-debtor. *W* objected to the attachment and sale of such property on the ground that it did not belong to the judgment-debtor, but was endowed property. His objections were disallowed, and the property was put up for sale on the 20th July, 1875, under the provisions of Act VIII of 1859, and was purchased by *K*. *W* subsequently sued *K* to establish his claim to the property and to have the sale set aside, and on the 13th August, 1876, obtained a decree setting it aside. Thereupon *K* sued *H* to recover the purchase-money, alleging a failure of consideration. *Held* that, the sale not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, but having been set aside in favour of a third party who had established his title to the property, and there being no question of fraud or misrepresentation on the part of the decree-holder, the suit was not maintainable. *Rajib Loshun v. Bimalamoni Dasi* (1) and *Sowdamini Chowdhraïn v. Krishna Kishor Poddar* (2) followed. *Mahua li Lal v. Kuansila* (3), *Nodkunth Sahee v. Asman Matho* (4), and *Doolhin Hur Nath Koorwerez v. Baijoo Oojha* (5) distinguished.

Held also that the auction-purchaser could not have applied under s. 315 of Act X of 1877 for the return of the purchase-money, as the provisions of that section could not have retrospective effect, and would not apply to a sale which had taken place before that Act came into operation. *In the matter of the petition of Mulo* (6) dissented from.

Per STRAIGHT, J.—That, had the provisions of that section been applicable, instead of instituting a suit, the auction-purchaser should have applied for the return of her purchase-money in the execution of the decree.

The facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Lala Latta Prasad and Lala Harkishen Das, for the appellant.

Munshi Hanuman Prasad and Mir Zakur Husain, for the respondent.

The following judgments were delivered by the Court :

OLDFIELD, J.—Hira Lal, defendant, the appellant before us, caused five bighas, fifteen biswas of land to be attached in execution of his decree against Khadim Husain and Isri Husain, as property belonging to the judgment-debtors. One Wilayat Husain objected to the attachment and sale on the ground that the property did not belong to the judgment-debtors, but was endowed property; his objections were disallowed, and the property was sold by auction,

(1) 2 B. L. R., A. C., 83; 10 W. R. 365.

(2) 4 B. L. R., F. B., 11; 12 W. R., F. B. S.

(3) I. L. R., 1 All., 563.

(4) H. C. R., N.-W. P., 1871, p. 67.

(5) H. C. R., N.-W. P., 1867, p. 50.

(6) I. L. R., 2 All., 299.

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and purchased by the plaintiff for Rs. 505 on the 20th July, 1875, and the money paid over to the defendant, and the sale was confirmed on the 11th September, 1875. Wilayat Husain, however, brought a suit to set aside the sale, on the ground that the judgment-debtors had no right and title in the property, which was an endowment, and he obtained a decree on the 18th August, 1876, and the sale was set aside. The plaintiff has now brought this suit to recover from the decree-holder the purchase-money with interest, and the Courts below have decreed the purchase-money with interest at six per cent. It is contended in second appeal that no suit will lie for refund of purchase-money, that plaintiff's proper remedy was to proceed in the execution department under the provisions of s. 315, Act X of 1877, and that interest should not be allowed.

In my opinion, the first plea is valid. The sale took place under the provisions of Act VIII of 1859, and, although s. 258 directs that, whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, this provision applies only to cases in which the sale has been set aside for irregularities or the like under ss. 257 and 258 of the Act, and not when a third party succeeds in establishing his title to the property. This view of the law has been held in a course of decisions of the Calcutta Court—*Rajib Lochun v. Bima'amoni Dast* (1) and *Sowdamini Chowdhraïn v. Krishna Kishor Poddar* (2), and I am not aware of any by this Court opposed to it. The case of *Makundi Lal v. Kaunsila* (3) proceeded on the ground that the decree-holder had fraudulently executed a decree against a person not bound by the decree, and had caused the sale of his property, and is not in point, nor are the two cases referred to by the Munsif. In *Neelkunt Sahas v. Asmun Malho* (4) there was no power to bring the judgment-debtor's property to sale under the decree; and in *Doolhin Hur Nath Koonweree v. Baijoo Oojha* (5) the decree-holder had caused property to be sold which though belonging to the judgment-debtor was not saleable in execution of a decree.

(1) 2 B. L. R., A. C., 83; 10 W. R.
365.

(2) 4 B. L. R., F. B., 11; 12 W. R.,
F. R. 8.

(3) I. L. R., 1 All., 568.

(4) H. C. R., N.-W. P., 1871, p. 67.

(5) H. C. R., N.-W. P., 1867, p. 50.

The terms of s. 315, Act X of 1877, are different to those of s. 258, and by s. 315, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid. But it is unnecessary to determine whether plaintiff could succeed under this section, as its provisions cannot have retrospective effect, and will not apply to a sale which has taken place before the Act came into operation; and I am unable to take the view on this point of the learned Judges who decided the case of *Mulo*, petitioner, decided the 7th May, 1879 (1), which was brought to our notice at the hearing.

The liability of a decree-holder must be decided according to the conditions of the sale in force when he caused the property to be sold, and any warranty of title in the judgment-debtor is not ordinarily given by the judgment-creditor in judicial sales held under the Civil Procedure Code; nor can it be held that the decree-holder undertook to warrant the title of the judgment-debtor in the property sold in the case before us. The rule of law in respect of sales in execution of decrees has been declared by the Privy Council in *Dorab Ali v. Abdul Aziz* (2). Their Lordships observe: "Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-debtor;" and again: "The Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment debtor".

The sale in the case before us not having been set aside in favour of the judgment-debtor on the ground of want of juris-

(1) I. L. R., 2 All., 299.

(2) I. L. R., 3 Calc., 806; L. R., 5 Ind. Ap., 116.

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dition or other illegality or irregularity affecting the sale, and there being no question of fraud or misrepresentation on the part of the decree-holder, I am of opinion that the plaintiff cannot succeed in this suit, and it should be dismissed, and the appeal decreed, with all costs, and the decrees of the lower Courts reversed.

STRAIGHT, J.—I am of the same opinion as my honourable colleague. It does not appear to me that the provisions of s. 315 of Act X of 1877 are applicable to a sale which took place in July, 1875, and the relief now afforded to auction-purchasers is not open to the plaintiff. Were there not a Full Bench decision of the Calcutta Court in *Sowdamini Chowdhraïn v. Krishna Kishor Poddar* (1) as to the construction to be placed upon s. 258 of Act VIII of 1859, I should have had no difficulty in holding that the setting aside of sale contemplated therein is governed by ss. 256 and 257, which gave the Court summary powers to set aside sales on the ground of material irregularity in "publishing or conducting them." In the present case no allegation of that kind is made, but the plaintiff bases her claim to a refund of the purchase-money paid by her, because the consideration for that payment has totally failed. It is not alleged that any fraud or misrepresentation was used at the time of the auction-sale, which took place through the Court, and it is clear that no warranty of title or guarantee of undisturbed possession can be implied to a purchaser.

The following rule of law laid down by Lord St. Leonards in *Vendors and Purchasers*, 14th edition, p. 1, is relevant:—"If at the time of the contract the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults and cannot claim any compensation for them." And in the same work the following passage occurs:—"If the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity (2)." In the present case, so far from there being any evidence of *mala fides* on the part of the judgment-creditor, the sale did not take place until Wilayat Husain's objections had been

(1) 4 B. L. R., F. B., 11; 12 W. R., F. B., 8.

(2) at p. 549.

heard and disposed of. There was, therefore, the strongest reason for his believing that the judgment-debtor had a saleable right, title, and interest in the property brought to sale.

Had the provisions of s. 315, Act X of 1877, been applicable, I think that the objection taken in the first ground of appeal by the appellant would have been fatal to the plaintiff's claim, and that, instead of instituting a regular suit, the proper course for an auction purchaser to pursue under circumstances such as those which have arisen in the present case is to apply under s. 312 in the execution department. This appeal must, therefore, be decreed with costs.

Appeal allowed.

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Straight.

DURGA PRASAD (DECREE-HOLDER) v. RAM CHARAN AND ANOTHER (JUDGMENT-DEBTORS).*

Appeal from Order setting aside sale of immovable property in the execution of Decree—Act X of 1877 (Civil Procedure Code), ss. 312, 588 (m)—Act XII of 1879, ss. 90 (16), 102—Act I of 1868 (General Clauses Act), s. 6.

On the 25th June, 1879, a Subordinate Judge made an order setting aside the sale of immovable property in the execution of a decree, from which an appeal was preferred, under Act X of 1877, to the District Court on the 25th July, 1879, before Act XII of 1879 came into force. *Held* that, as the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution, s. 102 of that Act did not apply, but as the appeal lay to the District Court under the law in force on that date, it was competent to dispose of it under the provisions of s. 6 of Act I of 1868.

Appeal from order No. 133 of 1879 (1) and Revision Case No. 38B. of 1879 (1) observed on.

This was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. The petitioner was a decree-holder, in the execution of whose decree certain immovable property belonging to his judgment-debtors had been sold. On the application of the judgment-debtors the sale was set aside by the Subordinate Judge of Farukhabad, the Court executing the decree, by an order bearing date the 25th June,

* Application under 622 of Act X of 1877 connected with First Appeal, No. 10 of 1880, from an order of R. F. Saunders, Esq., Judge of Farukhabad, dated the 6th December, 1879.

(1) Unreported, decided the 11th February, 1880.

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