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before us. In *Pestonji Bezonji v. Abdool Rahiman* (1) no question of title to immoveable property arose. There the mortgage contained a personal undertaking to repay, and the suit was for a money decree only. In *Qutub Husain v. Abdul Hasan* (2) the only question which could be called in any sense a question of title, was whether the defendant was the proprietor of the village in respect of which the plaintiff had been compelled to pay the Government revenue which he sought to recover in the suit. It does not even appear that the fact of such proprietorship was in issue. In *Kadaressur Mookerjea v. Gooroo Churn Mookerjea* (3) the sole question was, whether the plaintiff had purchased the properties for himself or *benami* for the defendants, and if as *benami* for the defendants, whether they were liable on the implied contract of indemnity.

In conclusion we hold that the respondent Balli is liable in this suit for the arrears of the annual payments of Rs. 25 claimed in the suit, and that the decree of the lower appellate Court, so far as Balli is concerned, must be accordingly reversed, and that this appeal must be allowed with costs.

BRODHURST, J. concurred.

MAHMOOD, J.—I concur.

Appeal allowed.

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 April 13.

Before, Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

BANDI BIBI (DEFENDANT) v. KALKA (PLAINTIFF).*

Execution of decree—Suit for confirmation of execution sale set aside by Collector—Jurisdiction of civil Court—Civil Procedure Code, s. 312.

A suit lies in a civil Court for confirmation of a sale held in execution of a decree by the Collector under s. 320 of the Civil Procedure Code, and to set aside an order passed by the Collector cancelling the sale. *Mudho Frasad v. Hansa Kuar* (4) referred to. *Azim-ud-din v. Baldeo* (5) followed.

In such a suit, where it is pleaded in defence that the property was sold for an inadequate price, it lies on the defendant to show that there has been a material irregularity in publishing or conducting the sale.

In this case the execution of a decree against the appellant, Musammat Bandi Bibi, was transferred to the Collector of Fateh-

* Second Appeal No. 628 of 1886, from a decree of Munshi Rai Kalwant Prasad, Subordinate Judge of Cawnpore, dated the 23rd November, 1885, confirming a decree of Maulvi Rahalla, Munsif of Cawnpore, dated the 8th April, 1885.

(1) I. L. R., 5 Bom. 463.

(3) 2 Calc. L. R., 388.

(2) I. L. R., 4 All. 134.

(4) I. L. R., 5 All. 314.

(5) I. L. R., 3 All. 554.

pur, under s. 320 of the Civil Procedure Code, and the Notification of Government, North-Western Provinces, No. 671, dated the 30th August, 1880. In execution, by order of the Collector, the zamindári property of the judgment-debtor was sold by public auction, on the 21st July, 1884, and was purchased by the plaintiff-respondent, Kalka. On the 6th September, 1884, the Collector, upon an application by the judgment-debtor, passed an order setting aside the sale, the only ground being apparently that the price realized was inadequate. No irregularity of the kind referred to in s. 311 of the Code was mentioned in this order. The auction-purchaser made no appeal from the order, but on the 21st March, 1885, brought the present suit in the Court of the Munsif of Fatehpur, in which he prayed that the sale of the 21st July, 1884, might be confirmed and the order of the 6th September, 1884, cancelled.

The defendants (the decree-holders and the judgment-debtor) pleaded, with reference to the last paragraph of s. 312 of the Civil Procedure Code, that the suit would not lie, and also that the order of the 6th September, 1884, was regular and should be maintained.

The Courts below overruled the first plea, on the authority of *Azim-ud-din v. Baldeo* (1). With reference to the second, they observed that it was for the defendant to prove that the price realized by the sale of the 21st July, 1884, was inadequate, and that the inadequacy was the result of material irregularity in publishing or conducting the sale; but that no such proof had been given. They accordingly decreed the claim. The defendant judgment-debtor appealed to the High Court.

Munshi *Hanuman Prasad*, for the appellant.

Munshi *Nawal Bihari*, for the respondent.

EDGE, C. J.—In this case the plaintiff was an auction-purchaser at a sale under an execution, and brought this action to obtain confirmation of this sale, the Collector having passed an order setting aside the sale. From that order no appeal was brought. The Courts below granted a decree in favour of the plaintiff. The defendant has appealed, and her points are: first, that the action

(1) I. L. R., 3 All. 554.

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cannot be maintained in a civil Court ; secondly, that the price realized was inadequate. In support of the first contention the appellants has relied upon the Full Bench judgment in the case of *Madho Prasad v. Hansa Kuar* (1) and a judgment in the case of *Jasoda v. Gulzari Lal* (2) and the case of *Dwarka Prasad v. Himmat Rai* (3). The two latter cases were decided on the authority of the first. The first case only decided that an appeal from an order made by the Collector in execution of a decree did not lie to the civil Court. We have had the opportunity of consulting our brothers Straight and Tyrrell who were parties to the judgment in the Full Bench case. They confirm us in the view that it was not intended to be laid down there that an action like this would not lie. For my part I do not think that the Full Bench decided any such question. No such question was before the Full Bench for their consideration. Now the case of *Azim-ud-din v. Baldeo* (4) which came before the Full Bench of this Court, decided that such an action would lie in a case where execution had proceeded in the civil Court. Munshi *Hanuman Prasad*, on behalf of the appellants, has contended that the effect of the order of the local Government of 12th November, 1883, rule 19, which provides, that "all orders under clause 13 passed by the Collector, shall be subject to appeal to the Commissioner of the Division, whose order shall be final," had the effect of taking away the right to maintain this action. Being of opinion that the cases cited by the Munshi do not apply, and being able to discover no difference in principle between this case and the case of *Azim-ud-din v. Baldeo* (4) to which I have referred, I am of opinion that the action does lie in the civil Court. As to the other point, whether the property was sold for an insufficient price, it lay on the defendant to show that there had been a material irregularity in publishing or conducting the sale. The findings of the Courts below are conclusive on that point. The appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing the appeal with costs.

Appeal dismissed.

(1) I. L. R., 5 All. 314.

(2) Not reported.

(3) Not reported.

(4) I. L. R., 3 All. 554.