increasing the apparent evidence of its genuineness is also a material alteration—*Suffell* v. *Bank of England*." In that case neither party appeared, so that the Court had not the advantage which we have had of hearing the question fully argued. We are unable to agree in the proposition laid down or in thinking that *Suffell* v. *Bank of England* supports it.

The decree of the lower Appellate Court will therefore be set aside, and that of the Munsiff affirmed with costs in all the Courts.

K. M. C. *Appeal decreed.*

Before Mr. Justice Mitter and Mr. Justice Macpherson.

KASHY NATH ROY CHOWDHRY (PLAINTIFF) *v.* SURBANAND SHAHA AND OTHERS (DEFENDANTS.)*

1885. *September* 2.

Attachment—Execution of decree.—Sale at instance of one attaching decree-holder during pendency of other attachments—Priority of attaching creditors—Rival decree-holders—Civil Procedure Code, (Act VIII of 1859), ss. 240, 242 and 270 and (Act XIV of 1882) ss. 284 and 295.

When a property is sold in execution of a decree it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold, and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground.

THE plaintiff in this case sought for a declaration of his right to, and confirmation of, his possession in a 10-gunda share of taluk Mohadeb Munshi, and also for an order for the registration of his name in respect thereof. The facts of the case were as follows:—The disputed share in the taluk was formerly the property of one Sita Nath Roy Chowdhry (defendant No. 1) against whom two persons named Shama Churn Bundopadhya and Hurrish Chunder Kurmokar had respectively obtained money decrees. Hurrish Chunder attached the property in dispute on the 12th June 1875, and, whilst under that attachment, it was sold on the 9th July 1875, at the instance of Shama Churn in execution of

*Appeal from Appellate Decree No. 1516 of 1884, against the decree of Baboo Kedar Nath Mozoomdar, Additional Subordinate Judge of Faridpur, dated the 4th July 1884, reversing the decree of Baboo Chandra Kumar Das, Munsiff of Madaripore, dated the 20th of May 1882.

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his decree, and purchased by Chunder Mohun Sen, ancestor of defendants Nos. 2 and 3 and Sriram Chuckerbutty defendant No. 4. This purchase was found to be *benami* for the owner of the property defendant No. 1. Subsequently the property was again sold on the 30th April 1876 in execution of Hurrish Chunder's decree in pursuance of the attachment put on it at his instance on the 12th June 1875, and purchased by the defendant No. 12 *benami* for defendant No. 11. Subsequently defendant No. 11 Chundi Churn Roy Chowdhry, sold the whole of the property in dispute for Rs. 300 to the plaintiff. After his purchase the plaintiff applied to have his name registered as proprietor of the share of the taluk in question, but he was opposed by defendants Nos. 5 to 10, and his application for registration was unsuccessful. He accordingly instituted the present suit.

Defendants Nos. 5 to 10 alone contested the suit upon the ground that they had purchased mouzah Baligram, which formed a portion of the disputed share in the taluk, by a *kobala* dated the 25th August 1875, from Chunder Mohun Sen and Sriram Chuckerbutty, and, amongst other pleas immaterial for the purpose of this report, they contended that the property having been once sold at auction in execution of Shama Churn's decree it could not again be sold at the instance of another decree-holder, and consequently the purchaser at the sale held at the instance of Hurrish Chunder could acquire no right to the mouzah Baligram as against them.

The first Court held that the purchase by the defendants Nos. 5 to 10 was invalid as against the plaintiff, inasmuch as their purchase was made on the 25th August 1875, whilst the property was still under attachment, at the instance of Hurrish Chunder, and that consequently the plaintiff was entitled to succeed, and finding the other issues raised in the suit in his favour gave him a decree in the terms of the prayer of his plaint.

Upon appeal the Subordinate Judge was of opinion that it was not proved that the attachment at the instance of Hurrish Chunder was duly made, and he further held that the effect of the auction sale at the instance of Shama Churn on the 9th July 1875 was to annul all previous attachments, and that consequently on the 25th August 1875 there was no attachment subsisting

on the property, and the alienation then made in favour of defendants Nos. 5 to 10 was valid. He further found that after the sale on the 9th July 1875 Hurrish Chunder had not again attached the property. He accordingly set aside the decree of the lower Court, and directed that the suit be dismissed with costs.

The plaintiff now preferred this second appeal to the High Court, upon the main ground that the lower Court was wrong in holding that the attachment at the instance of Hurrish Chunder came to an end on the sale held on the 9th July 1875, and he also contended that the suit should not have been dismissed altogether at the instance of defendants Nos. 5 to 10, who only claimed to be entitled to a portion of the property, the subject-matter of the suit, as the other defendants did not contest the remainder of his claim.

Baboo *Nilmadhub Bose* for the appellant.

Baboo *Kashy Kanta Sen* for the respondents.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The question which we have to determine in this case is, whether the *kobala*, dated 25th August 1875, executed by Chunder Mohun Sen, ancestor of the defendants Nos. 2 and 3 and Sriram Chuckerbutty defendant No. 4, in favour of defendants 5 to 10, of mouzah Baligram, was invalid under s. 240 of Act VIII of 1859, it being a private alienation by the judgment-debtor while the property was alleged to be under attachment.

The facts, as found by the Munsiff in this case, are as follows:—The property in dispute, *viz.*, a 10-gunda share of taluk Mohadeb Munshi was the property of defendant No. 1. Two persons, *viz.* Hurrish Chundra Kurmokar and Shama Churn Bundopadhya, held money decrees against the defendant No. 1. Hurrish Chunder attached the property in dispute on the 12th June 1875. While it was under this attachment, it was sold in execution of Shama Churn's decree on the 9th July 1875 and purchased by Chunder Mohun Sen, ancestor of defendants Nos. 2 and 3 and Sriram Chuckerbutty, defendant No. 4. This purchase is found to have been made by the judgment-debtor himself in

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the *benami* of the two aforesaid persons. Subsequently in Hurrish Chunder's execution, the property in dispute was again sold without a fresh attachment on the 20th April 1876, but intermediately the defendants Nos. 5 to 10 purchased mouzah Baligram, which is a part of the disputed property, on the 25th August 1875, ostensibly from the auction-purchasers Chunder Mohun Sen and Sriram Chuckerbutty, but really from the judgment-debtor, *viz.*, the defendant No. 1.

The Munsiff was of opinion that this purchase is invalid against the plaintiff who has purchased the property in dispute from the auction-purchaser in the second sale, *viz.*, that held on the 20th April 1876, because on the date of the defendants' purchase, the property sold was under attachment put upon it on the 12th June 1875. The Subordinate Judge was of a contrary opinion. He held that, after the attachment effected in Hurrish Chunder's decree in June 1875, the property in dispute having been sold on the 9th July 1875 under Shama Churn's decree, the attachment of June 1875 came to an end.

We are of opinion that the view taken by the Subordinate Judge upon this point is correct. It was held, under Act VIII of 1859, that priority of attachment does not give a decree-holder the right to set aside a sale made by another decree-holder on a subsequent attachment. See *Mohunt Nanak Buksh* v. *Koonwar Roy* (1), *Lalla Joogal Kishore Lall* v. *Bhukha Chowdhry* (2), and *Chutka Panda* v. *Gobordhone Dass* (3). It follows therefore that when a judicial sale takes place at the instance of a particular creditor, no other creditor holding decrees against the same judgment-debtor and who had attached the same property either before or after the date of the attachment effected at the instance of the creditor under whose decree it is sold, has any right to bring it to sale again. Although this view of the law was doubted in some of the cases decided under Act VIII of 1859, [see the observations of Sir Barnes Peacock, C.J., in the case of *Gogaram* v. *Kartick Chunder Singh* (4), and of Sir Richard Couch, C.J., in *Guru Prasad Sahu* v. *Mussamat Binda Bibi* (5)]

(1) 2 W. R., 62.
(2) 9 W. R., 244.
(3) 6 C. L. R., 85.
(4) B. L. R., Sup. Vol. 1022; 9 W. R., 514.
(5) 9 B. L. R. 180.

the decisions were not expressly overruled, neither is there any provision in the present Code of Civil Procedure which shows that the Legislature disapproved of the law laid down in the cases cited above. Not only is there no such provision in the present Code of Civil Procedure, but s. 295, which corresponds with s. 270 of the old Code, clearly indicates that the Legislature adopted the view taken in *Mohunt Nanak Buksh* v. *Koonwar Roy* (1), and *Lalla Joogal Kishore Lall* v. *Bhukha Chowdhry* (2). It must therefore be now taken to be settled law, that when a property is sold in execution of a decree, it cannot be sold again at the instance of a decree-holder who had attached it before the attachment effected by the decree-holder under whose decree it is actually sold.

It seems to us that one of the consequences which follows from this ruling is that, on the happening of a judicial sale, all previous attachments effected upon the property sold fall to the ground. The object of attachment is to prevent the judgment-debtor from dealing with the property by way of private alienation. The provisions of s. 295 of the present Code of Civil Procedure show that when a property is sold in execution of a decree it is sold not only for the realization of the money due under that particular decree, but of all other decrees, the holders of which have prior to the sale applied to the Court for execution of their decrees. Although this provision is not exactly similar to the provisions of the corresponding section of the old Code, *viz.*, s. 270, still both are based upon the same principle, *viz.*, that a sale in execution of a decree does not enure to the benefit of that decree-holder only at whose instance the property is sold, but also of other decree-holders who have fulfilled certain conditions. Therefore the sale which took place under Shama Churn Bundopadhya's decree on the 9th July 1875, was not only a sale for the realization of the money due under his decree, but also of the decree of Hurrish Chunder Kurmokar, who had applied for execution and taken out the process of attachment. Under s. 270 of Act VIII of 1859. Hurrish Chunder was entitled to share in the sale proceeds.

Having regard to the object of attachment as stated above it

(1) 2 W. R., 62. (2) 9 W. R., 244.

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follows that on the sale of the 9th July 1875, the attachment effected by Hurrish Chunder came to an end. If this were not so the rulings cited above, which as we have shown above were approved of by the Legislature, would be virtually overruled by the provisions of s. 284 of the present Code of Civil Procedure for the following reason. In the Full Bench case of *Anand Chandra Pal* v. *Panchi Lall Sarma* (1), Couch, C.J., in delivering the judgment of the majority of the Court, says, with reference to s. 242 of the old Code which corresponds with s. 284 of the present Code: "Now it is a rule that when a Statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. This has been often decided, and it is sufficient to quote the cases of *Macdougall* v. *Paterson* (2), *Crake* v. *Powell* (3), and *Bowes* v. *Hope Life Insurance Company* (4). In those cases the word used in the Statute was 'may.' According to this rule, the words, 'it shall be competent to the Court,' in s. 242 must not be construed as giving to the Court a power which it may exercise or not as it thinks fit, but as obligatory and conferring on the attaching creditor a right to have the attached property sold and the money realized by the sale, paid to him." That being so, if the attachment of Hurrish Chunder continued after the 9th July 1875, on his application it was obligatory on the Court under s. 242 of the old Code to sell the property again, which would be virtually overruling the decisions cited, *i.e.*, *Mohunt Nanak Buksh* v. *Koonwar Roy* (5), and *Lalla Joogul Kishore Lall* v. *Bhukha Chowdhry* (6).

For these reasons we are of opinion that the Subordinate Judge has taken a correct view of the effect of the attachment under s. 240 of the old Code. The sale, therefore, in favor of defendants Nos. 5 to 10 of mouzah Baligram was not invalid. That being so, the plaintiff's suit as against them, so far as this mouzah is concerned, was rightly dismissed; but the Subordinate Judge goes further and dismisses the whole suit. We do not see upon

(1) 5 B. L. R., 691.
(2) 11 C. B., 755.
(3) 2 E. and B., 210.
(4) 11 H. L. C., 389.
(5) 2 W. R., 62.
(6) 9 W. R., 244.

what ground he has done so. The defendants Nos. 5 to 10 question the plaintiff's title in respect to Baligram only. We, therefore, modify the decree of the lower Appellate Court and direct that the plaintiff's suit be dismissed in respect of mouzah Baligram. With this exception the decree given by the Munsiff will stand.

Under the circumstances of this case we think that each party should bear his own costs in this Court and in the lower Appellate Court.

H. T. H. *Appeal allowed and decree modified.*

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ABDUL HAKIM AND OTHERS (DEFENDANTS) *v.* GONESH DUTT AND OTHERS (PLAINTIFFS.)*

1885 *September* 3.

Easement—Embankment—Drainage—Right to drainage of surplus surface water through natural water-course.

The right of the owner of high lands to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country.

Where the defendants had erected a dam across a natural water-course which was found to interfere with the natural drainage of the surplus rain-water of the adjacent lands of the plaintiff, and where the lower Court had ordered that the dam be altogether removed,

Held, that the Court was wrong in taking it for granted that the plaintiffs were entitled to have the whole dam removed, but should have enquired *how far* the erection of the dam interfered with the plaintiffs' right.

IN this case the proprietor of mouzah Kenar sued the proprietors of mouzah Lalpurah for the removal of a dam alleged to have been erected by the latter on the 7th October 1880. The plaintiffs alleged that the water was drained off their lands through a *nigar* or natural water-course into a river named Samdahain which flowed through the defendants' lands, and they further alleged that the defendants had erected a dam across the river below where the water-course fell into it, and that the result had been to stop the drainage from their lands, and cause them damage which they estimated at Rs. 100 for removing the

* Appeal from Appellate Decree Nos. 1080 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 29th of March 1883, modifying the decree of Moulvi Mahomed Nurul Hosein, Second Subordinate Judge of that District, dated the 13th of April 1882.