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expressed their views on those issues and have remanded another issue or issues under s. 566, the same Judges should be bound to hear on the return to the remand the case *de novo*. In such a case I for one would confine counsel to the findings on remand, which, of course, I had not had an opportunity of considering before. The defendant in his appeal asks to have set aside that part of the decree which interferes with the *chajja* and drain he had made. It is found that no *chajja* or drain existed previous to the time of the erection of the additional building which the defendant has erected. The *chajja* extended an appreciable distance over the plaintiffs' land. It is obvious that if the plaintiffs were not entitled to a decree with regard to the *chajja* and drain, the defendant might in course of time acquire an easement which might seriously interfere with the enjoyment by the plaintiff of his land. I am of opinion that the appeal should be dismissed with costs. As to the objections, the findings on remand show that the plaintiff is entitled to have his right of privacy observed, and to have a mandatory order to compel the appellant to permanently close the door or window complained of. In this respect the decree of the Court below will be varied. I am of opinion that the objections should be allowed with costs.

BRODHURST, J.—On further consideration of this second appeal, I no longer hold the opinion that is expressed in the order of remand dated the 11th January last, and I concur in the judgment that has been delivered by the learned Chief Justice.

Decree modified.

PRIVY COUNCIL.

P. C.
J. C.
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December 3.

ZAIN-UL-ABDIN KHAN v. MUHAMMAD ASGHAR ALI KHAN AND OTHERS.

[On appeal from the High Court for the North-Western Provinces.]

Sale in execution of decree—Effect of reversal of decree upon sale in execution—Sale to bonâ fide *purchaser, not a party to the decree, distinguished from sale to decree-holder.*

A sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the

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decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.

A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bonâ fide* purchasers at other sales, under the same decree, who were no parties to it.

Held that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed.

Appeal from two decrees (11th June, 1883) of the High Court, reversing a decree (16th March, 1882) of the Subordinate Judge of Moradabad.

The question raised in this appeal was whether or not several auction sales of property formerly belonging to the appellant, who was judgment-debtor under the decree in satisfaction of which the sales took place, were to be set aside, on the ground that this decree had been, subsequently to the sales, so far modified by an appellate Court as to make what had been realized at a prior sale of the appellant's property sufficient to cover the amount finally decreed.

The sales were in execution of an an *ex parte* decree (8th April, 1874) obtained by three of the defendants in the present suit for possession of shares in zamindari lands and houses, and for mesne profits and payment of a dower-debt, also for money due on a promissory note, the whole aggregating in value more than a lakh of rupees.

An appeal having been rejected by the High Court (26th August, 1875) on the ground that there could be no appeal from such an *ex parte* decree, an appeal to Her Majesty in Council (1) (22nd November, 1878) resulted in a remand, followed by a decree of the High Court (1st March, 1880) disallowing part of the claim, on grounds, thus expressed in the judgment, having reference to jurisdiction, which affected the right to recover the dower-debt, and upon the promissory note:

(1) *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmed Raza Khan*, L. R. 5 I. A. 233.

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"The cause of action cannot be held to have arisen in the district of Moradabad, for the lady was a resident of Jaipur and died there, and the plaintiffs are residents of the foreign State of Jaipur, and the defendant dwells in the foreign State of Jaipur, and has no connection with Moradabad.

"Equally, the Court will not have jurisdiction to try the claim for the dower-debt: this item is claimed as part of the assets left by the lady and divisible among the heirs. As already stated, the lady died at Jaipur and had no connection with the district of Moradabad, and her marriage, and presumably the contract for dower, took place at Rampur."

By the decree (1st March, 1880) which followed this judgment, the former decree (8th April, 1874) was confirmed as to the estates in land and as to the mesne profits for Rs. 3,746 only, with Rs. 4,908 for costs.

Meanwhile, the holders of the decree of 1874 had, in that year, obtained orders for sale in execution of it and brought to sale some of the judgment-debtor's property.

The first sale was on the 17th November, 1874, and comprised a house known as Diwan Kaumal's in Moradabad, for Rs. 5,050, the purchaser being Ashgar Ali Khan, one of the present respondents.

This property was not included in the present claim, the plaintiff explaining that this sale might stand good as satisfying what was due under the decree of the 1st March, 1880. Of those sales which the present suit (22nd February, 1881) sought to have set aside, the first was a sale (21st November, 1874) of twelve and a half biswas owned by the plaintiff, appellant, in mauza Alata for Rs. 8,575. The second was a sale (20th November, 1875) of his right, title, and interest in other villages which had realized Rs. 18,900 and Rs. 12,000. Another was a sale (15th November, 1876) of the Bank Kothi in Meerut cantonment. At these sales the decree-holders had purchased some of the property, and they, or purchasers from them, were originally the only defendants. But by an order of the Court of first instance (17th January, 1882) the respondents, Har Sarup, Parshadi Lal, and Jeo Ram, purchasers

at the auction-sales, who were not parties to the decree of 8th April, 1874, were made defendants.

Issues having raised the question (among others) whether the sales could be set aside on the ground of the subsequent modification of the decree, the Subordinate Judge held that the plaintiff was entitled to have them set aside both as against the decree-holders who had brought the property to sale in satisfaction of their decree and had purchased at the sales, and as against the purchasers who were no parties to the decree.

The latter only were the appellants in the appeal to the High Court which followed, and a Divisional Bench (Straight and Oldfield, JJ.) reversed the above judgment as against them, on the ground that the sales, as against *bonâ fide* purchasers, not parties to the decree subsequently modified, were not rendered invalid by the modification taking place (1).

On this appeal,

Mr. *T. H Cowie, Q C.*, and Mr. *C. W. Arathoon*, appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *W. A. Raikes* appeared for the respondents.

For the appellants it was argued that the judgment of the first Court had been so far correct that all the sales subsequent to that which had realized enough to satisfy the decree as finally made should be set aside; and that the modification of the decree of the 8th April, 1874, which had taken place on the ground of the absence of jurisdiction, showed that sales realizing amounts in excess of what was ultimately allowed by the decree of 1st March, 1880 were unauthorized.

Reference was made to *Jadunath Kundu Chowdhry* v. *Brajanath Kundu* (2), *Kanhaye Singh* v. *Oomadhar Bhatt* (3), *Abdool Hye* v. *Nawab Raj* (4).

Counsel for the respondents were not called upon.

SIR B. PEACOCK gave their Lordships' judgment.

SIR B. PEACOCK.—In this case the plaintiff sued several defendants, claiming to set aside certain auction sales which had

(1) Weekly Notes, 1883, p. 158.
(2) 68 B. L. R., Appendix 90.
(3) 21 W. R. 291.
(4) B. L. R. Sup. Vol. 911, (F. B.)

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taken place under a decree of the Subordinate Judge of Moradabad, and for an order that the plaintiffs be put into absolute possession of the properties which were sold and are mentioned in the schedule to the plaint. In the schedule the properties and the purchasers thereof are separately described, and the action may be treated not as a joint action as regards all the property, but as an action against the several defendants as regards the properties of which they were severally purchasers.

Some of the defendants were the decree-holders, and some were persons who came in under them; but all the defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued. The circumstances are peculiar. The plaintiffs in the suit in which the execution was issued sued the present appellant in the Court of the Subordinate Judge of Moradabad to recover certain landed property situate in that district, and also mesne profits in respect of that property. They also sued for a large amount in respect of promissory notes which were alleged to be due from the present appellant to the plaintiffs in that suit, and a large amount alleged to be due from the appellant as dower to their mother, whom they represented. The defendant in that suit—the present appellant—objected that there was no jurisdiction on the part of the Subordinate Judge to try the suit, inasmuch as he, the then defendant, was not a resident in the district of Moradabad, but a resident in foreign territory, namely, Jaipur. But the Subordinate Judge decided that he had jurisdiction and gave a decree against him, not only for the lands which were situate in the district, and the mesne profits of those lands, but also for the amount which was claimed to be due on the promissory notes and on account of the dower.

That case was appealed to the High Court, but that Court dismissed the appeal upon the ground that the case was not appealable. An appeal was then preferred to Her Majesty in Council against that decision of the High Court, and Her Majesty in Council reversed the decision of the High Court and remanded

the case to be tried upon the merits. The High Court, when they tried the case upon the merits, reversed the decision of the Subordinate Judge as regards the amount decreed by the Subordinate Judge in respect of the dower and of the promissory notes, but affirmed his judgment as to the land which was situate within his jurisdiction, and the mesne profits in respect of that land. But before the judgment of the Privy Council, and before the decree of the High Court which reversed a part of the original judgment of the Subordinate Judge, the plaintiffs in that suit, who are now some of the defendants, executed their decree, and several sales took place under that execution. Under the first sale a certain amount was realised which would have been sufficient to cover the amount finally allowed by the decree of the High Court upon appeal. A second sale took place under which one of the defendants, Asghar Ali, purchased *bonâ fide*, he not being a party to the original decree.

The plaintiff brought his suit on the 22nd of February, 1881, not only against the decree-holders who had purchased under the execution, but as against the *bonâ fide* purchaser who was no party to the decree.

Pending the suit certain other defendants were added, as appears at page 2 of the record. The entry on the record is as follows:—"According to the order dated 17th January, 1882, Har Sarup, Parshadi Lal, and Jiwa Ram, auction-purchasers, were joined as defendants." The three defendants who were then joined were no parties to the decree, so that there are two sets of defendants in the suit: the decree-holders who purchased under their own execution; Asghar Ali, who purchased a portion of the property of the plaintiff, being a *bonâ fide* purchaser and a stranger to the decree; and the three other defendants, who were alleged to be auction-purchasers under the decree and who were no parties to it.

The plaintiff claimed that "the auction sales of the disputed property detailed in the plaint, held on 20th November, 1874, 20th November, 1875, and 15th November, 1876, be declared null and void, and the sale deed in favour of Shaukat Husain Khan, dated 2nd November, 1880, so far as it appertains to the plaintiff's claim,

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be set aside." Thus he claimed to set aside all the auction sales, not only as against the decree-holders who had purchased, but as against *bonâ fide* purchasers who were no parties to the decree. Secondly, he claimed that "plaintiff be put in absolute possession of the undermentioned property of the value of Rs. 21,450 after dispossession of the defendants."

Amongst other issues, one was whether the auction sale and the purchase, having been made *bonâ fide*, could be invalidated or set aside by the modification of the decree, and whether the limitation law barred the claim.

It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

A great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. In Bacon's Abridgment, Title "Error," it is laid down, citing old authorities, that "if a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgement is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." There are decisions to a similar effect in the High Court at Calcutta. They are collected in a note in Broughton, in his book on the Code of Civil Procedure, fourth edition, note to s. 246, Act VIII of 1859. So in this case, those *bonâ fide* purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the defendants were bound to restore the property; not only the decree-holders who had purchased, but the defendants who had purchased *bonâ fide*, not being

parties to the decree. In his judgment he says:—"The limitation period of one year has nothing to do with this case. The cause of action having accrued to plaintiff on the 1st March, 1880, the date when the decision was modified, and as he instituted the claim on 22nd February, 1881, it is on no account considered beyond time." Therefore he held that the suit was not barred, but that the plaintiff had a right to recover, not only as against the decree-holders, but as against the *bonâ fide* purchasers, who were no parties to the decree under which they purchased, and he decreed the plaintiff's suit. The defendant Asghar Ali and the three added defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court.

When the case came before the High Court they reversed that decision. They passed two decrees, one as regards the three appellants who were the added defendants, and the other as against Asghar Ali; but they are both in similar words. They said:—"Both appeals must be decreed with costs, and the decision of the Subordinate Judge being reversed, the plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the plaintiff's claim was dismissed, not only as regards the defendants who had appealed, but as regards the others who had not appealed. The decrees must, however, be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court and had not objected to the decision of the Subordinate Judge.

Their Lordships therefore will humbly advise Her Majesty that the decrees of the High Court ought to be treated as decrees against the plaintiff only so far as his suit related to the defendants who had appealed to the Court, and that being so treated, they ought to be affirmed; and that the decree of the Subordinate Judge should be reversed so far only as it related to the plaintiff's claim against those defendants. Their Lordships also think that the appellant must pay the costs of the respondents in this appeal.

Their Lordships wish it to be distinctly understood that in affirming the decrees of the High Court they treat them merely as

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decrees in favour of the defendants who were appellants to the High Court.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondents—Messrs. *Oeame and Summerhays.*

APPELLATE CRIMINAL.

1887
December 19.

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

QUEEN-EMPRESS *v.* POHP SINGH AND ANOTHER.

Criminal Procedure Code, s. 509—Deposition of medical witness taken by Magistrate tendered at sessions trial—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence—Act I of 1872 (*Evidence Act*), *s.* 80.

Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory.

S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. *Queen-Empress* v. *Riding* (1) referred to.

The facts of this case are sufficiently stated in the judgment of Edge, C.J.

Mr. *C. Dillon*, for the appellants.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

EDGE, C.J.—This is an appeal by Pohp Singh and Jaswant Singh, who were convicted by the Sessions Judge of Agra, on the 12th November last, of the murder of Musammat Khamani, and were by him sentenced to death. The principal evidence for the prosecution was that of Suraj Pal, a Brahman of Dhanola, a Chamar, and of Pancham Singh, a Thakur. Those three witnesses deposed to having seen the prisoners kicking the deceased woman, who was apparently fifty-five years of age, and to having seen the woman, after she had been kicked and rendered insensible, dragged or carried by the prisoners to a well and thrown into it by them.

(1) I. L. R., 9 All. 720.