

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Brodhurst.

1885
March 23.

MAN KUAR (PLAINTIFF) v. TARA SINGH AND OTHERS (DEFENDANTS) *

Sale in execution of decree—Sale set aside on objection by third person—Suit to have sale confirmed—Declaratory decree—Civil Procedure Code, ss. 244, 278, 283, 311—Act I of 1877 (Specific Relief Act), s. 42.

Held that persons other than the decree-holders or the persons whose property was sold in execution of decree were not competent to apply to the Court, under s. 311 of the Civil Procedure Code, to set aside the sale.

M in whose name property had been purchased at an execution-sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertised for sale.

Held that such a suit could only be maintained under s. 42 of the Specific Relief Act (I of 1877), but that s. 244 of the Civil Procedure Code indicated the intention of the Legislature that such questions should be determined in the execution department, and, reading together the provisions of ss. 244, 278, and 283 of the Code, the suit was premature and therefore not maintainable.

THE facts which gave rise to this suit were as follow:—The share in a certain village of certain persons called Bhola Nath and Sham Sundar was put up for sale in execution of a decree held against them by one Kanhaiya Lal, and was purchased in the name of their mother, Man Kuar, the plaintiff in this suit. The defendants in this suit, Tara Singh and Bhajan Singh, who held a decree against Bhola Nath and Sham Sundar, applied to have the sale set aside on the ground that the property had been fraudulently and collusively purchased by Bhola Nath and Sham Sundar, in their mother's name, after the sale had been irregularly published, in order to defeat their (defendants') decree. The Court executing the decree, in execution of which the property had been sold, allowed the application and set aside the sale. After this, the defendants caused the property to be attached and advertised for sale in execution of their decree as the property of Bhola Nath and Sham Sundar. Thereupon Man Kuar brought the present suit against them, in which she claimed to have the order setting aside the sale set aside, and the sale confirmed in her favour, and to have it declared that the property was not

* Second Appeal No. 494 of 1884, from a decree of A. F. Millet, Esq., District Judge of Sháhjahánpur, dated the 21st August, 1883, affirming a decree of Mirza Abid Ali Beg, Subordinate Judge of Sháhjahánpur, dated the 11th June, 1883.

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liable to be sold in execution of the decree of the defendants against Uhol Nath and Sham Sundar.

The Court of first instance held that, although the defendants were not competent to object to the sale under s. 311 of the Civil Procedure Code, yet in a suit to have the sale confirmed they were entitled to object to it; and that there had been material irregularity in the publication of the sale, and therefore the sale was invalid. It therefore dismissed the plaintiff's suit. This decree, on appeal by the plaintiff, was affirmed by the lower appellate Court.

In this second appeal, the plaintiff contended that the defendants were not competent to object to the sale, and the order setting it aside was made *ultra vires*, and should be set aside.

Pandit *Ajudhia Nath*, and Babu *Ratan Chand*, for the appellant.

Pandit *Bishambar Nath*, for the respondents.

PETHERAM, C. J., and BRODHURST, J.—We think that the appeal must be allowed on both grounds. The facts of the case are somewhat complicated, but when one comes to look at them, they appear to be as follows:—A decree was obtained by one Kanhaiya Lal against four persons, who may, for the purposes of this decision, be styled defendants *A* and *B* and defendants *C* and *D*. *A* and *B* were owners of one property and *C* and *D* were owners of another property. Both properties were attached and put up to sale; but as the two properties were distinct and situated in different places, they were put up to sale in two separate lots. The property of *A* and *B* was sold and purchased ostensibly by the uncle for the mother of *A* and *B*. For the purposes of deciding this point, and for this purpose only, I assume that the property was purchased by the mother by the money of *A* and *B*; that *A* and *B* found the money; and that the mother was the trustee for *A* and *B* in respect of this property. Upon the application of *C* and *D* impeaching the sale on the ground that the property was really purchased by *A* and *B* fraudulently and in collusion, the Court set aside the sale under s. 311, Civil Procedure Code. The first question then is, whether the order setting aside the sale on the objections of *C* and *D* is correct? Whether the order setting

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aside the sale was just or unjust is beside the question. The question is, could *C* and *D* object under s. 311 to the validity of the sale of the property of *A* and *B*, and had the Court jurisdiction to set aside the sale on the application of *C* and *D*? Now *C* and *D* were neither the decree-holders nor the persons whose property was sold, and we do not see how they could apply under s. 311 to set aside the sale. We think the order setting aside the sale was without jurisdiction and invalid, and it must be reversed. The other question is, whether in this suit, brought by the mother on the allegations that this sale was improperly set aside, and that *C* and *D* have attached this property on the allegation that it was the property of *A* and *B*, their debtors (her two sons), she could contest the validity of the execution-proceedings taken by *C* and *D* on the allegation that the property was hers. It may be that she has a right to bring the suit, but the question is whether at present it is maintainable at all? If it is maintainable at all, it must be under s. 42 of Act I of 1877. To maintain such a suit, the plaintiff must allege that she is entitled to a legal character and right, and that *C* and *D* are interested in denying her right. Looking at s. 42 of Act I of 1877 alone, it may be said with considerable force that such a suit is maintainable. But if we look at s. 244 of the Civil Procedure Code, it indicates the intention of the framers of the Code that such questions should be determined in the execution department. S. 278 of the same Code provides a machinery for contesting the validity of execution-proceedings, and s. 283 again provides the machinery by which a regular suit is brought to contest the validity of the order passed in the execution department. Reading all these sections together, we do not think the suit is maintainable, and the proper mode for contesting the validity of the execution-proceedings is the one indicated by the Procedure Code. The suit is premature, and upon that ground and no other we dismiss the suit. The appeal is allowed in respect to the first claim. The second claim will be dismissed on the ground that it is premature. Under the circumstances of the case the appeal is allowed, but without costs.

Appeal allowed.