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plea taken is, that the appellant was no party to the decree, and his property, which has been the subject of the sale, was not liable to be attached and sold, and therefore the sale is invalid.

This is not an objection which is entertainable under s. 311, which permits a sale to be set aside for material irregularity in publishing or conducting it, and is not a ground, therefore, for setting aside the sale under that section. We cannot therefore hold that the order refusing to set aside the sale is wrong by reason of this objection.

Moreover, it is now preferred for the first time, and, we may add, was an objection which the appellant might or should have taken under s. 278 at the time of attachment, and he would then have had his remedy as therein provided.

The other pleas fail, as no material irregularity such as the appellant refers to in those pleas has been established. The appeal is dismissed with costs.

Appeal dismissed.

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February 6.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

GOBARDHAN DAS (JUDGMENT-DEBTOR) *v.* GOPAL RAM AND OTHERS (DECREE-HOLDERS).*

Execution of decree—The decree to be executed where there has been an appeal.

The effect of the decision of the Full Bench in *Shohrat Singh* v. *Bridgman* (1) is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the appellate Court.

Kristo Kinkur Roy v. *Rajah Burrodacaunt Roy* (2) referred to.

Where the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of first instance, *held* that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance, was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed.

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* Second Appeal No. 23 of 1884, from an order of A. F. Millet, Esq., District Judge of Shâhjahânpur, dated the 17th September, 1883, reversing an order of Maulvi Saiyid Muhammad, Munsif of West Budaun, dated the 6th July, 1883.

(1) I. L. R., 4 All., 376. (2) 14 Moo. I. A., 465.

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ON the 5th May, 1879, an original decree was passed in favour of the respondents in this case against the appellant. This decree was affirmed, on appeal, on the 29th August, 1879, and, on an appeal being preferred from the appellate decree, that decree was affirmed by the High Court on the 31st May, 1880. The decree-holders made an application for execution to the Court of first instance. In this application the decree sought to be executed was stated to be the original decree, dated the 5th May, 1879. The judgment-debtor objected to this application being granted, on the ground that the decree-holders should have applied for execution of the High Court's decree, that being the final decree in the suit. This objection the Court of first instance allowed, and made an order rejecting the application, referring to *Shohrat Singh* v. *Bridgman* (1). On appeal by the decree-holders, the lower appellate Court reversed this order, and directed the Court of first instance to proceed with the application.

The judgment-debtor appealed to the High Court on the ground, among others, that the decree of the original Court was not executable, having been superseded by the High Court's decree.

Mr. *T. Conlan* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The respondents obtained a decree against the appellant in the Court of the Munsif of West Budaun on the 5th May, 1879. This decree was affirmed on appeal by the District Judge, and on second appeal by the High Court.

The decree-holders applied for execution in the Munsif's Court, and this application was rejected on the ground that the application was irregular, as it was an application to execute the decree of the first Court, whereas it should have been to execute the decree of the High Court, as the final Court of appeal. The District Judge reversed this order, on the ground that, however irregular the application may have been, execution had been allowed without

(1) I. L. R., 1 All., 376.

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objection previously on similar applications, and the judgment-debtor was estopped from objecting to the execution. The judgment-debtor has appealed. His first plea relates to the ground on which the Judge has proceeded: but he has taken another plea, viz., that the decree of the Court of first instance cannot be executed, the decree to be executed being the decree of the High Court, as the final Court of appeal, and in consequence the Munsif's order disallowing execution is correct. I shall deal with the last objection, as it will dispose of the appeal.

The appellant supports the plea by reference to the Full Bench decision of this Court in *Shohrat Singh* v. *Bridgman* (1) and the case of *Muhammad Altaf Ali* v. *Bholanath* (2).

In my opinion there has been a misconception of the meaning and effect of the Full Bench decision, and it does not support the contention of the appellant.

The question which was referred in *Shohrat Singh* v. *Bridgman* was, "where a suit is heard in first or second appeal and a decree is passed, is the decree of the Court of last instance the sole decree which is capable of execution, or may the specifications contained in the decree of the lower Court or Courts be referred to and enforced by the Court to which the application for execution has been made?" and it was held that the "appellate decree is the final decree, and the only decree capable of being executed after it has been passed, whether the same reverses, modifies, or confirms the decree of the Court from which the appeal is made;" but it was added that, where the appellate decrees are not prepared as they should be, by entering the mandatory part of the lower Court's decree, which was affirmed, "but the decree of the lower Court, with all its specifications, is simply affirmed by, and adopted in, the decree of the last appellate Court, it would then be open to the Court executing such last decree to refer to the decree of the lower Court for information as to its particular contents."

The effect is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred

(1) I. L. R., 4 All., 376. (2) Weekly Notes, 1882, p. 126.

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to, and the mandatory part of it so affirmed should be executed as though it was the decree of the appellate Court.

This question was raised in the case of *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (1). Their Lordships of the Privy Council referred to the decisions of the Calcutta and Madras Courts to the effect that "whether the decree of the lower Court is reversed, or modified, or affirmed, the decree passed by the appellate Court is the final decree in the suit, and, as such, the only decree which is capable of being enforced by execution."

Their Lordships remarked as follows:—"If the question were *res integra*, they would incline to the view that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, for the reasons already given (one of them was that whatever decree is executed is to be executed by the lower Court, in which the record remains or to which it is to be returned) that the question is not of much practical importance, their Lordships will not express any dissent from the rulings of the Madras Court and the Full Bench of the Bengal Court further than by saying that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree."

In the case above noticed, where the appellate Court dismisses the appeal without affirming the decree of the lower Court, it is obviously the lower Court's decree which must be executed, and the necessity of referring to the superseded decree is recognized where the appellate Court's decree has not embodied in its decree the mandatory part of the decree it intended to affirm. Speaking for myself, the decision of the Full Bench of this Court was meant to decide the question in the sense in which it was regarded by their Lordships of the Privy Council.

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It is really, as their Lordships observe, of little practical importance whether the decree of the first Court or the last Court, in cases where the latter affirms the mandatory part, is to be regarded as the decree to be executed, for in either case the Court of first instance executes the decree, and can refer to its own decree for particulars of the mandatory part affirmed.

The objection therefore that the decree-holder has not in his application expressly asked the Court to execute the decree of last instance becomes a mere technical objection, where the object of the application is clear and undoubted.

In the case before us, the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the object of the application was clearly to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of first instance, and there was no reason why the execution should not have been allwed. On these grounds I would dismiss the appeal with costs.

MAHMOOD, J.—I concur so entirely in what my learned brother Oldfield has said that under ordinary circumstances I should not have added a single word. But I may add that I have, on several occasions, sitting as a Judge in Oudh, expressed my dissent from the Full Bench ruling of this Court in *Shohrat Singh* v. *Bridgman* (1), and acted upon the contrary opinion, which, of course, I was competent to do, the Courts in Oudh not being bound by the decisions of this Court, and I have in this Court also expressed my dissent from it. I only wish to say that the head-note to the report of that case does not fully explain the scope of the decision, and the judgment itself, if, with all deference to the learned Judges who passed it, I may say so, is liable to misapprehension. My brother Oldfield, however, has now explained its precise scope, and I entirely concur in the rule as explained by him. It has been sreiously misunderstood by the Mufassal Courts, which have, in consequence, refused execution of decrees in many cases (which have come to my notice) in which it should have been allowed.

Appeal dismissed.

(1) I. L. R., 4 All., 378.