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decree, was the property of the judgment-debtor, or property which would be liable to his debts. Consequently, when such objection is taken before the Court executing a decree for money, that Court has power to inquire into and decide on any such objection taken to the execution of the decree against any particular property. Where, however, the decree is a decree for sale under the Transfer of Property Act, the Court executing the decree must sell the property decreed to be sold and leave any one objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser. For these reasons we are of opinion that the Court of first appeal was right and that section 244 of the Code of Civil Procedure did not bar this suit.

We dismiss this appeal and affirm the decision of the Court.

Appeal dismissed.

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Before Mr. Justice Knox and Mr. Justice Burkitt.

THE BANK OF UPPER INDIA (PLAINTIFF) *v.* SHEO PRASAD AND OTHERS (DEFENDANTS).*

Execution of decree—Civil Procedure Code section 276*—Attachment—Effect upon maintenance of attachment of order dismissing application for execution.*

Where property has once been attached in execution of a decree, an order merely dismissing an application for execution, which order does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. *Gunga Rai* v. *Mussumat Sakeena Begum* (1); *Nadir Hossein* v. *Pearoo Thovildarinee* (2); and *Golam Yaheya* v. *Sham Soonduree Kooeree* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *J. E. Howard* and *E. A. Howard,* for the appellant.

Munshi *Ram Prasad* and Pandit *Sundar Lal,* for the respondents.

* First Appeal No. 213 of 1895 from a decree of Saiyid Zain-ul-Abdín, Subordinate Judge of Cawnpore, dated the 5th September 1895.

(1) N.-W. P. H. C. Rep. 1873, p. 72. (2) 14 B. L. R. 425.
(3) 12 W. R. 142.

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BURKITT, J. (KNOX, J. concurring).—This case is a very instructive illustration of the saying that a successful litigant's troubles commence when he tries to execute his decree, as we have here the case of a decree-holder who for more than eleven years has been unable to obtain the fruits of a decree in his favour.

The facts are as follows:—

One Sheo Bakhsh lent money to one Adhar Singh wherewith to pay the Government revenue due from him and to save his property from sale. No security was taken for the loan. The money not being repaid, Sheo Bakhsh sued Adhar Singh and obtained a money decree on the 24th April 1886 for some Rs. 9,642 odd. He took out execution in May 1887 by attaching two villages belonging to his judgment-debtor, namely, Atarra Mahal Ajit Singh and Bairipur, and asked that they should be sold and his decree paid off from the proceeds of the sale. His troubles then began. An objection to the attachment was made by Bijai Singh, son of the judgment-debtor. Bijai Singh claimed these villages as his property under a deed of gift, dated June 23rd, 1886, from his father, the judgment-debtor. The Court executing the decree allowed the objection and directed the attachment to be removed. That order was passed in May, 1888. The decree-holder thereupon instituted a suit against his judgment-debtor and against Bijai Singh, and on February 14th, 1889, he obtained a decree declaring that the two villages were liable to attachment and sale in execution of the decree of April 1886. An appeal was taken against the declaratory decree, but was dismissed by the High Court on January 28th, 1891. Meanwhile the decree-holder took prompt action on the decree of February 14th, 1889. He made an application on February 19th, 1889, to the execution Court, on the strength of that decree, asking for attachment and sale of the two villages. That application was granted, an attachment being levied on the two villages on the 22nd June 1889. As the villages attached were ancestral property, the further execution of the decree was, on September 12th, 1889, transferred to the Collector under the rules framed by Government to give

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effect to section 320 of the Code of Civil Procedure. The case, however, did not remain long in the Collector's Court. For on January 31st, 1890, as the decree-holder was unable to attend at his Court in camp in the interior of the district, the Deputy Collector, on whose file the execution case was pending, struck it off for default and returned the papers to the Subordinate Judge, who at once followed suit by striking the case off his pending files. This proceeding was quite unnecessary, as he had struck the case off his files when he sent it to the Collector in September. The decree-holder then made several ineffectual attempts to induce the Subordinate Judge to send back the case for further execution to the Collector. At last, on an application made in September, 1890, the Subordinate Judge directed the case to be again sent to the Collector for further execution. This order was made on November 19th, 1890. The result of this last order was in our opinion to restore the state of things which existed on September 12th, 1889, when the decree first was sent to the Collector for execution. There was no necessity for any further attachment. The orders of the Deputy Collector and of the Subordinate Judge striking the execution case off their files of pending cases did not dissolve the attachment which had been imposed in the previous June, 1889. No formal order was passed by either tribunal withdrawing the attachment, and the decree-holder certainly had neither asked for nor consented to such a withdrawal. In this opinion we are supported by the authority of many decided cases, *e.g. Gunga Rai* v. *Mussumat Sakeena Begum* (1), *Nadir Hossein* v. *Pearoo Thovildarinee* (2), *Golam Yaheya* v. *Sham Soonduree Kooeree* (3), &c. We may add also that as to this point no question was raised nor any argument addressed to us at the hearing of this appeal. With the retransfer of the execution case to the Collector the decree-holder's troubles did not come to an end. The judgment-debtor early in January 1891, put in a petition before the Subordinate Judge in which, on various tech-

(1) N.-W. P. H. C. Rep., 1873, p. 70. (2) 14 B. L. R., 425.
(3) 12 W. R., 142.

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nical grounds, he objected to the continuance of the execution proceedings before the Collector. That petition was rejected on technical grounds on April 17th, 1891. The judgment-debtor, however, persevered, and, on April 13th, 1891, he again put in a petition in which on technical grounds he contended that the decree was not capable of execution, and prayed that the decree-holder's application for execution might be disallowed. The Subordinate Judge thereupon went into the matter, and by order dated June 8th, 1891, held that the pending proceedings in execution could not be maintained, and disallowed the application for execution. The Subordinate Judge held that the application was barred under section 158 of the Code of Civil Procedure by reason of the infructuous proceedings mentioned above, which took place between the orders of January 31st and November 19th, 1890.

The result of the decision of June 8th, 1891, was that the decree-holder's execution proceedings before the Collector came to an abrupt termination, and the papers were returned to the Subordinate Judge. So after the expiration of more than five years from the date of his decree the decree-holder, through no fault of his own, found himself no nearer getting the benefit of his decree than he had been in 1886. He, however, now appealed to the High Court against the order of June 1891, and prayed that Court to order execution of his decree to be proceeded with. The appeal was allowed by the High Court on December 15th, 1892, the order of the Subordinate Judge was set aside, and it was ordered that "the proceedings in execution will proceed." Thereupon the decree-holder again applied to the Subordinate Judge on the strength of the order of the High Court and the case was on his application, by order of March 3rd, 1894, again sent to the Collector for further execution. Even then the judgment-debtor was not satisfied. He again, on April 21st, 1894, applied to the execution Court objecting to the order for execution, and to the transfer of the proceedings to the Collector. It is not necessary to notice the reasons he gave for his objection. Here the appellant

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Bank for the first time came on the scene. It also, on May 4th, 1894, practically supported the objections made by the judgment-debtor and called on the Court to compel the decree-holder to attach anew and to notify the terms of a mortgage it held from the judgment-debtor. Both objections were over-ruled by the Court, and an appeal to the High Court was dismissed in June 1896.

But meanwhile, *i.e.* between the orders of June 8th, 1891 and of December 15th, 1892, the case had entered into a new phase. On the 4th of January, 1892, the judgment-debtor, jointly with his son, Bijai Singh, borrowed Rs. 30,000 from the Bank of Upper India and, as security for the repayment of the loan, mortgaged six villages, among which are the two villages Atarra Mahal Ajit Singh and Bairipur which the decree-holder Sheo Bakhsh had attached on June 22nd, 1889, in execution of his decree, and in respect of which the execution proceedings had been twice transferred to the Collector. Hence the present suit, in which the plaintiff Bank seeks to enforce its mortgage by sale of all the mortgaged villages. The persons impleaded as defendants are Adhar and his son (who have not appeared) and the five sons of Sheo Bakhsh, the decree-holder referred to above, now deceased. The lower Court gave the Bank a decree for recovery of the loan by the sale of the mortgaged property, with the exception of Atarra Mahal Ajit Singh and Bairipur. It held that, as these villages were under attachment to satisfy the decree held by Sheo Bakhsh's sons, the Bank could not bring them to sale unless it paid off that decree. The Bank appeals, contending that it is entitled to a decree for sale of the two villages just mentioned.

In the memorandum of appeal the Bank refers to what it calls a "finding" by the Subordinate Judge that Sheo Bakhsh was a consenting party to the mortgage of January, 1892. We are unable to discover any such "finding" on the record. The Subordinate Judge in that which he calls "a short account of the case," but which clearly is no more than a historical *résumé* of

the case of each party, does say that "Sheo Bakhsh having joined the executants expressed his consent to the contents of the document." It is impossible to say where the Subordinate Judge got that statement. It is not mentioned in the plaint, nor referred to in the written statement, nor was it put in issue. Neither Adhar nor Bijai Singh put in an appearance, so the statement could not have been made by them, and the present respondents certainly did not make any such admission and do not admit it now. The Bank's mortgage deed also contains no assent whatever by Sheo Bakhsh nor any mention of his name; the only parties to it are the Bank, Bijai and Adhar. Probably the fact was asserted by the Bank's pleader when stating his case in the lower Court, and that would explain why—no evidence being produced to support it—the Subordinate Judge made no mention of it in his judgment. It is too large a draft on our credulity to ask us to believe that Sheo Bakhsh, who for years had been straining every nerve to obtain execution of his decree, and whose appeal was then pending in the High Court, could have taken such a fatal step as to assent to the mortgage of January 4th, 1892. We notice that in its judgment of January 28th, 1891, referred to above, the High Court treated with contempt a similar plea that Sheo Bakhsh had consented to the deed of gift.

Passing away from that matter, we have now to decide whether the appellant Bank is entitled to a decree for sale of the two villages under its mortgage, or whether the respondents have a prior lien. The Subordinate Judge has found in favour of the respondents. In our opinion his decision is right. The declaratory decree given by the Subordinate Judge on February 14th, 1889 (affirmed by the High Court on January 28th, 1891), decided finally that the two villages were liable to sale in execution of Sheo Bakhsh's decree, and that decree bound not merely Adhar and Bijai, but also their mortgagee the Bank, which claims title through them. It has been held by some authorities that the decree of February 14th, 1889, had the effect of restoring the attachment which had been removed on May 12th, 1888. It is

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unnecessary to decide that point, as the two villages were again duly attached on June 22nd, 1889, and undoubtedly remained subject to that attachment at least up to June 8th, 1891, the date on which the Subordinate Judge disallowed the then pending application for execution, wrongly holding that that application was barred under section 158 of the Code of Civil Procedure. Now it is in our opinion very doubtful whether that order had the effect of dissolving the attachment. The order did not formally withdraw the attachment, nor did it declare (as was incorrectly stated at the hearing of this appeal) that the decree was incapable of execution. It did no more than lay down that execution should not be allowed on that particular application. But if it be the case that the effect of that order was to dissolve the attachment, we are of opinion that the effect of the order of the High Court in appeal (December 15th, 189-) was to wipe out the order of June 8th, 1891, and to re-establish the position of the parties as it stood before that order was made. The argument for the appellant Bank is that the effect of the order of the High Court was to send the decree-holder back to the Subordinate Judge with a bare money decree in his hands, deprived of the security he had obtained by the attachment in June, 1889, and of the benefit of the protection given by section 276 of the Code of Civil Procedure. In short, it is contended that the only course open to this decree-holder, on succeeding in his appeal in the High Court, and on obtaining from that Court an order that the proceedings in execution should proceed, was to apply again for attachment and sale and to begin *de novo*, subject to any alienation which his judgment-debtor might have made in the interval between the two orders. Admittedly the decree-holder was in no way in fault. It was the Subordinate Judge who made a wrong order, and, if the contention for the appellant be correct, the effect of that wrong order is to damnify the unfortunate decree-holder most disastrously by enabling Adhar successfully to swindle his creditor. We are unable to believe that the law can be as contended for by the appellant Bank. We are of opinion that when the High Court

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set aside the wrong order of the Subordinate Judge, it set it aside to the fullest extent, and that, if the effect of that order was to dissolve the attachment, the effect of the appellate order was to cancel that portion also of the Subordinate Judge's order. We fail to see why we should hold that that portion of the order was not affected by the appellate decree. We hold, therefore, that the two villages in dispute in this appeal were at the date of the appellant Bank's mortgage lying under a duly perfected and existent attachment in execution of Sheo Bakhsh's decree, and that under the provision of section 276 of the Code of Civil Procedure the Bank's mortgage is void against any claims enforceable under that attachment, and therefore void against the decree held by the respondents.

It also was contended that the Bank's mortgage would, under the provision of section 52 of the Transfer of Property Act, be inoperative as against the respondent's decree on the ground that the mortgage was entered into during the active prosecution of a contentious proceeding in which the right to sell the dispute villages was directly and specifically in question. We, however, consider it to be unnecessary to express any opinion on that question.

For the reasons given above we are of opinion that this appeal fails. We therefore dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Burkitt.

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May 17.

BISHAN CHAND (DEFENDANT) *v.* RADHA KISHAN DAS (PLAINTIFF).*

Contract—Sale—Deposit—Contract going off by default of purchaser—Vendor entitled to retain deposit.

Held that where a contract for sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract. *Ex parte Barrell, in re Parnell* (1) and *Howe* v. *Smith* (2) referred to.

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*First Appeal No. 220 of 1895, from an order of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 22nd August 1895.

(1) L. R., 10 Ch. App. 512. (2) L. R., 27 Ch. D. 89.