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March 12.*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.\**

LALJI MAL (DEFENDANT) v. NAND KISHORE (PLAINTIFF).

*Execution of decree—Civil Procedure Code, section 244—Representative of a party to the suit—Purchaser of property under attachment in execution of a decree.*

The purchaser of property which is under attachment in execution of a decree is a representative of the judgment-debtor under that decree within the meaning of section 244 of the Code of Civil Procedure. *Madho Das v. Ramji Patak* (1) referred to.

A person to whom section 244 of the Code of Civil Procedure applies cannot avoid the application of that section by filing his objection to execution under section 278. *Shankar Dat Dube v. Harman and Co.*, (2) and *Imdad Ali v. Jagan Lal* (3) referred to.

In this case the plaintiff, Nand. Kishore, sued for a decree declaring that the interest of his judgment-debtor, Ram Mohan, in certain property was liable to sale in execution of his decree dated the 25th of May 1889. On the 2nd of May 1891 Ram Mohan had transferred the property in suit by a private sale to the second defendant, Lalji Mal. At that time the property was under attachment in pursuance of the decree of the 25th of May 1889. On application being made by the decree-holder to bring the said property to sale in execution of his decree, Lalji Mal filed an objection under section 278 of the Code of Civil Procedure. That objection was allowed: hence the present suit.

The Court of first instance (Subordinate Judge of Bareilly) dismissed the suit. The plaintiff appealed, and the Court of first appeal allowed the appeal and made an order of remand under section 562 of the Code of Civil Procedure. From that order of remand the defendant Lalji Mal appealed to the High Court.

Mr. D. N. Banerji, for the appellant.

Mr. T. Conlan and Pandit Sundar Lal, for the respondent.

EDGE, C. J. and BLAIR, J.—Lalji Mal purchased from the judgment-debtors some immovable property whilst it was under attachment in execution of a decree. Application was sub-

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\* First Appeal No. 100 of 1896 from an order of E. J. Kitts, Esq., District Judge of Bareilly, dated the 27th August 1896.

(1) I. L. R., 16 All. 286.

(2) I. L. R., 17 All. 245.

(3) I. L. R., 17 All. 478.

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sequently made to bring that property to sale in execution of the decree. Lalji Mal filed an objection under section 278 of the Code of Civil Procedure and that objection was allowed. Thereupon Nand Kishore, the judgment-creditor, brought this suit under section 283 of the Code to have it declared that the property purchased by Lalji Mal might be brought to sale in execution of his (Nand Kishore's) decree. The first Court dismissed the suit. The second Court, in appeal, set aside the decree of the first Court and made an order of remand under section 562 of the Code of Civil Procedure. From that order this appeal has been brought.

It is contended on behalf of the appellant, Lalji Mal, that the suit did not lie, as the order passed on his objection was an order in a matter to which section 244 of the Code applied. On the other side it is contended that Lalji Mal was not a representative of a judgment-debtor within the meaning of section 244, and further, that, his objection having been filed under section 278 of the Code, section 244 did not apply.

Convenience, which is not always a good reason for laying down a proposition of law, would suggest that a sale which was contrary to the provisions of section 276 of the Code of Civil Procedure, should, if challenged by the decree-holder, be a matter to be adjudicated upon under section 244. In our opinion, as the property in question was under attachment at the time the sale took place, the purchaser must be treated as a representative of the judgment-debtor; on the same principle as he would have been a representative of the judgment-debtor by reason of his purchase, if the decree had been one for sale of a particular property. The position of a purchaser of a property affected by a decree for sale was discussed by this Court in *Madho Das v. Ramji Patak* (1).

Now as to the other point. It has been decided by two different Benches of this Court that a person to whom section 244 of the Code applies cannot avoid the application of that section by filing his objection to execution under section 278. The cases

(1) I. L. R., 16 All. 286.

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to which we refer are *Shankar Dat Dube v. J. G. Harman and Co.*, (1) and *Imdad Ali v. Jagun Lal* (2). The plaintiff's suit was, in our opinion, barred by section 244 of the Code of Civil Procedure.

We allow this appeal with costs, and, setting aside the order of the Court below, we dismiss the appeal to the Court below with costs, and restore and affirm the decree of the Court of first instance.

*Appeal decreed.*

*Before Mr. Justice Banerji and Mr. Justice Aikman*

MUHAMMAD YUNUS KHAN AND ANOTHER (DEFENDANTS) v. MUHAMMAD YUSUF (PLAINTIFF).\*

*Pre-emption—Muhammadian law—Effect of offer by pre-emptor to purchase from vendee—Talab-i-ishtishhad—Witnesses—Servants of pre-emptor.*

*Held* that where a pre-emptor continues to assert his pre-emptive right, and on the strength of that right and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale price, without resorting to, and with a view to avoid litigation, he cannot be said to have acquiesced in the sale and waived his right of pre-emption.

*Held* also that in the making of the *talab-i-ishtishhad* the servants of the pre-emptor are competent witnesses. The disability in this respect imposed by the Muhammadan law is limited to minors and persons convicted of slander.

*Muhammad Navir-ud-din v. Abdul Hasan* (3) followed. *Habib-un-nissa v. Abdul Rahim* (4) referred to.

In this case the plaintiff, Muhammad Yusuf, sued for possession by right of pre-emption of a house and compound sold by Hafiz Abdul Karim to Muhammad Yunus Khan and Muhammad Isa Khan, defendants on the 27th of June, 1893. The plaintiff based his claim on Muhammadan law and also on the *wajib-ul-arz*. The defendants, vendees, pleaded that the Muhammadan law did not apply under the special circumstances of the case, and that the formalities required by that law had not been observed by the plaintiff. The other pleas taken by the defendants related to the claim so far as it might be based on the *wajib-ul-arz*.

\* First Appeal No. 71 of 1894, from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 22nd January 1895.

(1) I. L. R., 17 All., 245.

(3) I. L. R., 16 All., 300.

(2) I. L. R., 17 All., 478.

(4) I. L. R., 8 All., 275.