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lower appellate Court. I do not agree with this contention. The application for the amendment of the sale certificate was made by the respondent in his capacity as auction purchaser, and not in his capacity as decree-holder. It is the auction purchaser to whom a certificate of sale is granted under section 316, and it is the auction purchaser who can, under sections 318 and 319, apply for delivery of possession over the property sold. The decree-holder, as such, is not entitled to a sale certificate, nor is he, as such, entitled to ask for possession. Further, the question of amendment of the sale certificate and of delivery of possession to the auction purchaser is not a question which arises between the parties to the suit or their representatives and relates to the execution, discharge, or satisfaction of the decree. Section 244 has no application to the present case. This view is supported by the ruling of the Calcutta High Court in *Bujha Roy v. Ram Kumar Pershad* (1). The case of *Gulam Shabbir v. Dwarka Prasad* (2) is also in point. The ruling in *Imdad Ali v. Jagan Lal* (3), on which the learned vakil for the respondent relies, has no bearing on the present question.

As no appeal lay to the learned District Judge from the order of the Court of first instance, his appellate order cannot be sustained. I allow the appeal, set aside the decree of the Court below with costs, and restore that of the Court of first instance.

The appellant will have his costs of this appeal.

*Appeal decreed.*

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August 6.

*Before Mr. Justice Burkitt and Mr. Justice Chamier.*

DURGA KUNWAR (PLAINTIFF) v. BALWANT SINGH (DEFENDANT).  
*Civil Procedure Code, sections 244, 294—Procedure—Suit to set aside sale in execution on the ground that the real purchasers were the decree-holders who had not obtained leave to bid—Proper remedy by application.*

The plaintiff sued to set aside a sale of certain property in execution of a decree against him, on the grounds that the sale proceedings had been

\* Second appeal No. 740 of 1900, from a decree of B. J. Dalal, Esq., District Judge of Mainpuri, dated the 6th March 1900, reversing a decree of Maulvi Muhammad Muzhar Husain, Subordinate Judge of Mainpuri, dated the 22nd December 1897.

(1) (1899) I. L. R., 26 Cal., 529.

(2) (1895) I. L. R., 18 All., 36.

(3) (1895) I. L. R., 17 All., 478.

secretly brought about without the knowledge of the plaintiff, and that the certified auction purchasers were *benamidars* for the decree-holders, who had not obtained permission to purchase. Held that under the above circumstances the plaintiff's remedy was not by suit, but by application under section 244 and the last clause of section 294 of the Code of Civil Procedure. *Viraraghava Ayyangar v. Venkatacharyar* (1), *Viraraghava v. Venkata* (2), *Chintaman-rav Natu v. Fithabai* (3), *Genu v. Sakharam* (4), *Subbarayudu v. Kotayya* (5) *Mahomed Gasee Chowdhry v. Ram Loll Sen* (6) *Mohendro Narain Chaturaj v. Gopal Mondul* (7), *Prosunno Kumar Sanyal v. Kali Das Sanyal* (8) and *Bhubon Mohun Pal v. Nunda Lal Dey* (9) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Rsoof* (for whom Mr. *Abdul Jabil*) for the appellant.

Pandit *Baldeo Ram* for the respondent.

BURKITT and CHAMIER, JJ.—The suit out of which this appeal has arisen was instituted by one Gyan Singh, the present appellant's husband, and the object of the suit was to have set aside a judicial sale of the plaintiff's property, which had taken place in execution of a money decree obtained by Musammatt Ratan Kunwar and others. The grounds on which it was sought to set aside the sale were that the sale proceedings had been secretly brought about without the knowledge of the plaintiff, and that the certified auction purchasers, namely, Balwant Singh and Zabar Singh, were *benamidars* for the decree-holders, who had not obtained permission to purchase; in short, that the decree-holders had purchased without first having obtained permission from the Court. The Court of first instance gave the plaintiff a decree. The lower appellate Court reversed the decision of the first Court and dismissed the suit, holding that the plaintiff had mistaken his remedy, and that instead of instituting a regular suit he ought to have made an application in the execution proceedings under section 244 and the last clause of section 294 of the Code of Civil Procedure. In appeal here it is contended that the decree of the Court below is wrong, and that the plaintiff was entitled to bring a regular suit to have the sale set aside. Now

(1) (1882) I. L. R., 5 Mad., 217.

(2) (1892) I. L. R., 16 Mad., 287.

(3) (1887) I. L. R., 11 Bom., 588.

(4) (1896) I. L. R., 22 Bom., 271.

(5) (1892) I. L. R., 15 Mad., 389.

(6) (1884) I. L. R., 10 Calc., 757.

(7) (1890) I. L. R., 17 Calc., 769.

(8) (1892) I. L. R., 19 Calc., 683.

(9) (1899) I. L. R., 26 Calc., 324.

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in our opinion this question is one which is concluded by the authority of a long string of cases in the Madras, Bombay and Calcutta Courts. So far back as 1882, just before the present Code of Civil Procedure became law, it was held by the Madras High Court in *Viraraghava Ayyangar v. Venkatacharyar* (1) that in a matter of this kind a regular suit would not lie, and that the proper procedure was by an application under section 244, Civil Procedure Code. The case we have just referred to was followed in *Viraraghava v. Venkata* (2) and by the Bombay Court in *Chintamanrav Natu v. Vithabai* (3), which, in turn, was followed in the case of *Genu v. Sakharam* (4). For the appellant the case of *Subbarayadu v. Kotayya* (5), was cited. That case, however, is no authority on the question before us. The question in that case was whether the agent of a party who had obtained permission to purchase and who purchased for himself, and not for his principal, could be allowed to sue for possession of the property which he had so purchased. The case of *Mahomed Gazeer Chowdhry v. Ram Lall Sen* (6), was also cited for the appellant. The decision in that case has no bearing upon the question before us, but some remarks in the judgment of that case support the appellant's contention. The case of *Mohendro Narain Chaturaj v. Gopal Mondul* (7), is, as far as it goes, in favour of the appellant. But the authority of that case was much shaken by the remarks of the Privy Council in the case of *Prosunno Kumar Sanyal v. Kabi Das Sanyal* (8), which are entirely consonant with the rule laid down by the Madras and Bombay High Courts in the cases cited above. This has been recognised by the Calcutta High Court in *Bhubon Mohun Pal v. Nunda Lal Dey* (9), and the cases referred to in the foot-notes to that case. It appears to us that there is an overwhelming current of authority against the appellant's contention in this case. We are of opinion that the suit brought by the plaintiff was not maintainable, and was properly dismissed by the lower appellate Court.

(1) (1882) I. L. R., 5 Mad., 217.

(2) (1892) I. L. R., 16 Mad., 287.

(3) (1887) I. L. R., 11 Bom., 588.

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(8) (1892) I. L. R., 19 Calc., 683.

(9) (1899) I. L. R., 26 Calc., 324.

Another point raised for the appellant was, that only one of the *benamidars*, namely, Balwant Singh, appealed from the judgment of the first Court. The other *benamidar*, Zabar Singh, did not join in the appeal, and was not brought in as a respondent. It is contended that, as far as Zabar Singh is concerned, the decision of the first Court has become final. As to that question, it is sufficient to refer to section 544 of the Code of Civil Procedure. This is clearly a case to which that section applies. The decree appealed against did proceed on a ground common to the two *benamidars*, and that being so, it was quite allowable for one of them to appeal against that decree. The reversal of the decree of the first Court enured to the benefit of both the *benamidars*. We are unable in this case to treat the plaint as an application made in the execution proceedings under sections 244 and 294. The execution proceedings were in the Court of the Munsif, and this suit was instituted in the Court of the Subordinate Judge, who is not seised of the execution proceedings. For the above reasons we dismiss this appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Burkitt and Mr. Justice Chamier.*

PADARATH (DEFPNDANT) v. RAM GHULAM (PLAINTIFF).\*

*Act No. XII of 1881 (North-Western Provinces Rent Act), sections 10, 93, 95—Act No. XIX of 1873 (North-Western Provinces Land Revenue Act), section 241—Jurisdiction—Civil and Revenue Courts—Suit by mortgagee from occupancy tenant for possession of the mortgaged property against occupancy tenant and an alleged trespasser, and for a declaration.*

The plaintiff was the mortgagee from an occupancy tenant of some 34 odd bighas of land. When he attempted to take possession of the land under his mortgage, he was resisted by a third party who was in possession of about half of the land in question. The plaintiff accordingly sued in a Civil Court for possession of 17 bighas 15 biswas 18 dhurs of land "by virtue of the first defendant's right of occupancy and his (the plaintiff's) right as mortgagee," and also for a declaration that the second defendant had "nothing to do with the land."

\* Second Appeal No. 60 of 1900 from a decree of H. E. Holme, Esq., District Judge of Azamgarh, dated the 6th October 1899, confirming a decree of Munshi Murari Lal, Munsif of Mohandabad Gohna, dated the 30th August 1899.

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