

1901

LACHHO
BIBI
v.
GOPI
NARAIN.

where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on to displace the case for proving the will." See *Barry v. Butlin* (1), *Fulton v. Andrew* (2), *Tyrrell v. Painton* (3) and *Farrelly v. Corrigan* (4). With regard to the nature of the evidence required in such cases to establish knowledge of, or assent to, the contents of a will, Parke, B., in the case first cited, said:—"In all cases the *onus* is imposed on the party propounding the will; it is in general discharge by proof of capacity, and the fact of execution, from which knowledge of, and assent to, the contents are assumed * * * * Nor can it be necessary that in all cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for reading over the instrument. They form no doubt the most satisfactory, though not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased." See also *Mitchell v. Thomas* (5). On the other hand, there is no rigid rule that if the Court is satisfied that a testator of a competent mind has read his will, or had it read to him, and has thereupon executed it, all further inquiry is shut out (see *Fulton v. Andrew*, per Lord Hatherley).

[The judgment then went on to discuss the facts of the case, and ultimately affirmed the decision of the District Judge granting probate and dismissed the appeal. Only so much of the judgment is set forth as is material for the purposes of the present report.—ED.]

Before Mr. Justice Banerji.

SADDO KUNWAR (JUDGMENT-DEBTOR) v. BANSI DHAR
(DECREE-HOLDER).*

*Execution of decree—Sale in execution—Purchase by decree-holder—
Application for amendment of sale certificate—Appeal.*

A decree-holder applying for execution of his decree asked for a 2 annas 8 pies share belonging to his judgment-debtor to be put up to sale. This

* Second Appeal No. 1421 of 1900 from a decree of J. E. Gill, Esq., District Judge of Allahabad, dated the 14th September 1900, reversing a decree of H. David, Esq., Subordinate Judge of Allahabad, dated the 2nd October 1899.

(1) (1838) 2 Moo. P. C. 480. (3) (1893) L. R., 1894 P. D., 151.
(2) (1875) L. R., 7 H. L., 448. (4) (1893) L. R., 1899 A. C., 563.
(5) (1847) 6 Moo. P. C. 137.

share was advertised for sale, and ultimately the decree-holder himself bought at the sale; but a sale certificate was granted to him in respect of a 2 annas 5 pies share only. The decree-holder applied for amendment of the sale certificate, which was refused him. He then appealed against the order of the Court refusing to amend.

Held, that no appeal lay from such order, either under section 588 or by virtue of section 244 of the Code of Civil Procedure. *Bujha Roy v. Ram Kumar Pershad* (1) and *Gulam Shabbir v. Dwarka Prasad* (2) referred to.

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

Mr. *J. Simeon* for the appellant.

Munshi *Jang Bahadur Lal* for the respondent.

BANERJĪ, J.—The respondent obtained a decree against the appellant, and in execution of that decree caused a 2 anna 8 pie share to be advertised for sale. A sale took place, and was in due course confirmed. A certificate of sale was granted under section 316 of the Code of Civil Procedure to the auction purchaser, who happened to be the decree-holder himself. In that certificate the extent of the share sold was stated to be 2 annas 5 pies. He applied for delivery of possession, and possession was delivered to him over 2 annas 5 pies. He then made an application to the Court which executed the decree, alleging that the extent of share sold at auction, and purchased by him, was 2 annas 8 pies; that the said extent of share should have been stated in the sale certificate; and that possession should have been delivered to him in respect of it. He prayed that the certificate of sale be amended, and that he be put into possession of the remaining 3 pie share. This application was refused by the Court of first instance. He appealed to the District Judge, who entertained the appeal, set aside the order of the Court of first instance, and granted his prayer. It is contended in this appeal, which has been preferred by the judgment-debtor, that no appeal lay to the Court below. This contention must, in my opinion, prevail. The order of the Court of first instance was admittedly not appealable under section 588 of the Code of Civil Procedure. It is urged on behalf of the respondents that it was an order under section 244 of the Code of Civil Procedure, and therefore an appeal lay from it to the

1901

SADDO
KUNWAR
v.
BANSI
DHAR.

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

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

1901

SADDO
KUNWAR
v.
BANSI
DHAB.

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.

1901

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 Mafzhar 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.