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the time of the attachment, that is, the money subject to the lien for costs then incurred. Babu Nobin Chund Bural will be entitled to be paid the amount due to him for costs up to the 18th June, 1886, the date of the attachment. Then Mr. Bonnerjee's client will be entitled to any balance that may remain as far as his claim extends; any further balance, if any, to Babu Nobin Chund Bural in satisfaction of his claim for costs. Costs of both parties to be paid out of the fund in the first instance.

Attorney for the applicant: Baboo *Nobin Chund Bural*.

Attorneys for Lubbah: Messrs. *Beeby and Rutter*.

T. A. P.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Cunningham.

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 March 7.

PAT DASI (PLAINTIFF) v. SHARUP CHAND MALA AND ANOTHER (DEFENDANTS),*

Decree, Evidence of satisfaction of—Adjustment of decree without certifying—Civil Procedure Code, 1882, s. 258—Proof of payment of decree otherwise than by certificate—Fraudulent execution of decree after adjustment.

Where a decree has been satisfied out of Court, and the payment has not been recorded in accordance with s. 258 of the Civil Procedure Code, it is nevertheless open to the *quondam* judgment-debtor, when suing to have a sale made by the *quondam* decree-holder after satisfaction of the decree set aside, to prove the payment of the decretal money otherwise than by a certificate under that section.

THIS was a suit for confirmation of possession of certain property and for a declaration that an auction sale of the said property might be set aside as invalid.

It appeared that one Shib Prosad Pal had obtained a decree against the present plaintiff, Pat Dasi, for arrears of rent of a certain under-tenure, and that Pat Dasi had satisfied this decree

* Appeal from Appellate Decree No. 1272 of 1886, against the decree of R. Towers, Esq., Judge of Midnapore, dated the 9th of April, 1886, reversing the decree of Baboo Revali Churn Banerjee, Munsiff of Contai, dated the 6th of May, 1885.

in full out of Court, the payment never having been duly certified to the Court in accordance with the provisions of s. 258 of the Civil Procedure Code; that, notwithstanding the decree had been satisfied, Shib Prosad Pal took out execution and sold the under-tenure and other lands belonging to Pat Dasi in one lot, of which one Sharup Chand Mala became the purchaser. There was, however, no evidence to show that the auction-purchaser was aware that the decree had been satisfied.

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Pat Dasi then brought this present suit against Sharup Chand Mala and Shib Prosad Pal for the purposes above mentioned.

The defendants both contended that the plaintiff not having taken objection to the sale in the execution proceedings was not entitled to ask to have the sale set aside by suit; and defendant Sharup Chand Mala further contended that, even if Shib Prosad Pal had granted a receipt in full satisfaction of the decree, the money was paid out of Court and had not afterwards been certified to the Court, and that therefore his position as auction-purchaser could not be affected, the decree remaining virtually unexecuted.

The Munsiff held that the suit was one based on an allegation of fraud and would lie; that the procedure adopted by the decree-holder in executing his decree was irregular, the under-tenure not having been first put up for sale; and that on that account the sale ought to be set aside. He therefore reversed the sale and declared the plaintiff's right to the land sued for, confirming him in possession thereof.

The auction-purchaser, Sharup Chand Mala, appealed to the District Judge, who considered that the finding of the Munsiff as to irregularity in the sale was a finding on an objection which could be only taken in the execution proceedings, and that having regard to the case of *Kristo Ram Roy v. Janokee Nath Roy* (1), it was doubtful whether the fact of the under-tenure not having been first sold was an irregularity at all. He further held, citing the cases referred to under s. 312 of O'Kinealy's Code, that a sale under a decree obtained by fraud could not be set aside when the auction-purchaser was not a party to the fraud, and

(1) I. L. R., 7 Calc., 748.

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that the plaintiff's remedy lay in a suit for damages. He therefore reversed the decree of the Munsiff.

The plaintiff appealed to the High Court.

Baboo *Rash Behari Ghose* for the appellant contended that the decree of the Munsiff was correct, citing *Lalit Mohun Roy v. Binodai Dabee* (1) as dissenting from *Kristo Ram Roy v. Janokee Nath Roy* (2). He further contended that the cases cited in the note to s. 312 in O'Kinealy's Civil Procedure Code were no bar to the plaintiff's suit, and that the District Judge in relying on those decisions as being a bar to the suit had acted wrongly.

[PETHERAM, C.J.—The question seems to me to be, can the judgment-debtor prove the payment of the decretal money otherwise than by the certificate referred to in s. 258 of the Code.]

Mr. *Tvidale* for the respondent contended that the auction-purchaser was not a party to the fraud, and that, therefore, the sale to him ought not to be reversed; that s. 258 clearly laid down that no adjustment of a decree should be recognised by the Court unless certified to it, and that the certificate referred to in that section is the only evidence of any adjustment of the decree; that there is authority for holding that a sale in execution of a decree, which decree is subsequently set aside on appeal, stands good.

The judgment of the Court (PETHERAM, C.J., and CUNNINGHAM, J.) was delivered by

PETHERAM, C.J.—This is a suit which is brought by a person to have it declared that the auction sale of his property made in execution of a decree is invalid, and that his possession of it is valid as against the auction-purchaser.

The facts of the case are that the decree was obtained against this plaintiff by one of the defendants for a certain sum of money; that after it had been obtained the present plaintiff satisfied the decree by payment, but he did not have the payment certified under the provisions of s. 258 of the Code of Civil Procedure; and that, notwithstanding such payment, the execution-creditor went on and put up the property for sale, and it was purchased by the other defendants in this suit. Under

(1) I. L. R., 14 Calc., 14.

(2) I. L. R., 7 Calc., 748.

these circumstances the owner of the property, the person who paid the money and who now finds that his property has been sold behind his back, brings this suit for the purpose of having it declared that the sale is of no effect as against him ; and the only question is whether he can prove that payment otherwise than by a certificate under s. 258.

It is contended, on behalf of the purchaser, that this section prescribes the only mode in which such payment could be proved for any purpose whatever, in any suit whatever, and before any Court whatever ; in other words, that the section alters the law of evidence on that point, and renders this transaction not provable in the ordinary way but only by that certificate.

It is true that the words of the section are of a kind that they may be susceptible of that meaning, but it seems to us that if the legislature intended to make such a great change in the law as that would imply, they would have expressed it in words that would leave the matter free from all doubt, and inasmuch as the words of the section are ambiguous in this sense, that they are susceptible of the larger meaning and also susceptible of the meaning that the payment shall be proved in other ways than that prescribed in the section, we think that it is the duty of the Court to give them this meaning and not the larger meaning, which would have such an effect, and which would be a kind of legislation which one would not expect to find in the third clause of a section relating to execution proceedings.

Under these circumstances we are of opinion that it was competent to the plaintiff to prove this payment in the way he has proved it, and having proved it to the satisfaction of both the lower Courts it follows that the decree in the former suit was satisfied and was inoperative against the owner of the property, and therefore the plaintiff is entitled to a decree confirming him in possession as against the purchaser and declaring that the sale under this satisfied decree is void and of no effect.

Under these circumstances we decree this appeal with costs as against the defendant No. 2.

Appeal allowed.

T. A. P.

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