

has been given is, at the time she makes the application, still holding the position of wife, but I know of no further step relaxing the clear words of section 490. To me the reason appears obvious. If a person against whom an order for maintenance has been made considers that such an order should no longer be in force against him, it is for him to apply under section 489 and get the order altered. It does not seem suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof. I do not think this is a case in which I should interfere. Let the record be returned.

1902

PRABHU LAL
v.
RAMI.

APPELLATE CIVIL.

1902
August 13.

Before Mr. Justice Banerji.

SHEO PRASAD (DEFENDANT) v. MUHAMMAD MOHSIN KHAN

(PLAINIFF).*

Civil Procedure Code, sections 310A, 320—Execution of decree—Section 310A not applicable to proceedings in execution held by a Collector under section 320.

Held that the provisions of section 310A of the Code of Civil Procedure have no application to execution proceedings taken by a Collector under section 320 of the Code and the rules framed by the Local Government thereunder governing such proceedings.

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

Maulvi *Ghulam Mujtaba* for the appellant.

Mr. *Abdul Raoof* for the respondent.

BANERJI, J.—This was a suit brought by the respondent for the cancellation of an auction sale, for possession of the property comprised in the sale and for mesne profits, under the following circumstances. The property in question belonged to Har Bakhsh, the ancestor of the defendants Nos. 1 to 4. One Salim Khan obtained a money decree against Har Bakhsh on the 13th of April, 1896, and in execution thereof caused the property in question to be attached. As the property was ancestral within the meaning of the notification of Government,

* Second Appeal No. 650 of 1901, from the decree of Maulvi Syed Siraj-ud-din, Judge of the Small Cause Court at Agra, dated the 29th March, 1901, reversing the decree of Babu Baidya Nath Das, Officiating Munsif of Agra, dated the 28th June, 1900.

1902

SHEO PRASAD

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the execution of the decree was transferred to the Collector under section 320 of the Code of Civil Procedure. The Collector decided to sell the property, and fixed the 20th of January, 1899, for the sale. On the 19th of January, 1899, the defendants Nos. 1 to 4 mortgaged the attached property to the plaintiff-respondent. The amount of the decree not having been paid, the property was sold on the 20th of January, 1899, and was purchased by the appellant, Sheo Prasad. On the 24th of January, 1899, the defendants Nos. 1 to 4 made an application to the Collector, purporting to be an application under section 310A of the Code of Civil Procedure, by which they tendered the amount of the decree, together with the additional 5 per cent. required by the section, and applied to have the sale set aside. On the 16th of February, 1899, the defendant Tika withdrew that application. On the 18th of February, 1899, the plaintiff, Hafiz Muhammad Mohsin Khan, asked the Collector to consider the application of the 24th of January, 1899, to be an application made by him, to accept the decretal amount and the additional 5 per cent. from him, and to set aside the sale. This application was refused, and on the 23rd of March, 1899, the sale was confirmed in favour of Sheo Prasad, who afterwards got possession. Thereupon the present suit was brought by the plaintiff on the ground that the application of the 24th of January, 1899, was withdrawn by Tika in collusion with Sheo Prasad and with a view to defraud the plaintiff. This is the only ground on which the plaintiff seeks by this suit to have the sale, which was confirmed by the Collector, set aside, and to obtain possession of the property sold as mortgagee thereof. The Court of first instance dismissed the suit, but the lower appellate Court has set aside the decree of the Court of first instance and decreed the claim. From that decree the present appeal has been brought.

In my opinion the appeal must prevail. The plaintiff has no cause of action unless he can show that the provisions of section 310A of the Code of Civil Procedure applied to the proceedings before the Collector. Section 320 of the Code of Civil Procedure provides that the local Government may frame rules for regulating the procedure of the Collector and his subordinates

in execution of decrees transferred to the Collector under that section. The general provisions of the Code of Civil Procedure do not apply to proceedings held by the Collector for the execution of such decrees. The rules framed by the Government under the authority vested in it by section 320 are printed in Appendix A to the Rules of Court of the 4th of April, 1894. These rules do not contain any provisions similar to those of section 310A. Consequently, even if there had been no collusion between Tika, defendant, and the auction-purchaser, and if the application of the 24th of January, 1899, had not been withdrawn by Tika, the Collector was not competent to set aside the sale upon that application. The learned Counsel for the respondent has not been able to point out any order of Government which has made section 310A applicable to proceedings held by the Collector in such cases. That being so, the Court of first instance, in my opinion, rightly held that the plaintiff had no cause of action. The mortgage to him was made after the attachment of the property and before the auction sale. It was, therefore, void under the provisions of section 276 of the Code against all claims enforceable under the attachment, and cannot prevail against the auction sale which took place in pursuance of that attachment. The sale having been confirmed, has become final, and no suit can be brought to have it set aside. The lower appellate Court has overlooked the fact that section 310A of the Code of Civil Procedure had no application to the proceedings before the Collector. For the above reasons I allow this appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

1902

SHEO PRASAD
v.
MUHAMMAD
MOHSIN
KHAN.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BRIJ BHUKHAN DAS (PLAINTIFF) v. SAMI-UD-DIN AHMAD KHAN AND OTHERS (DEFENDANTS).*

1902
November
21.

Act No. IX of 1872 (Indian Contract Act), section 74—Act No. VI of 1899, sections 1 and 4—Bond—Stipulation for enhanced interest from date of bond in breach of covenant to pay interest—Penalty.

In a bond executed on the 8th of November, 1892, to secure a sum of Rs. 8,000, it was stipulated that interest should be paid every six months at the

* First Appeal No. 97 of 1900, from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 13th January, 1900.