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IN THE
MATTER
OF THE
PETITION
OF BHUP
KUNWAR.

It was faintly argued by the learned Government Advocate that the order passed by the Munsif in this case was one under section 643 of the Code of Civil Procedure, and thus, not being an order under the Code of Criminal Procedure, could not be revised under section 439 of that Code. There is nothing, however, to show that the Munsif proceeded under section 643 of the Code of Civil Procedure. On the contrary, the fact that he refers in his order to section 476 of the Code of Criminal Procedure, and states that he did not consider it necessary "to make any preliminary inquiry under section 476 of the Code of Criminal Procedure" leaves no room for doubt that he took action under that section. This objection of the learned Government Advocate must therefore in my opinion fail.

I would overrule the preliminary objection and entertain and hear this application for revision.

BY THE COURT.

The order of the Court therefore is that the rule which has been granted be discharged and the application dismissed.

APPELLATE CIVIL.

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December 23.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.
RAM BAKSHI (PLAINTIFF) v. MUGHLANI KHANAM (DEFENDANT).
Act No. IV of 1882 (Transfer of Property Act), section 54—Sale—Transfer of immovable property without written conveyance in satisfaction of a decree—Title of transferee—Muhammadan law—Dower.

A Muhammadan widow obtained a decree for dower against her four sons. The decree was partly satisfied, and as regards the balance of the decretal money the parties entered into a parcel agreement for the transfer of certain immovable property by the judgment-debtors to the decree-holder. In pursuance of this agreement possession was transferred, but the agreement was never put into writing, and no conveyance was executed. After the widow had been for some years in possession, a judgment-creditor of one of the sons attempted to take the property in question in execution of his decree and brought a suit for a declaration that the property was liable to attachment and sale in execution of his decree.

Hold that, although the transfer of the property in question was not a transfer made by a Court in satisfaction of a decree, yet under the circumstances of the case it could not be taken and sold as the property

* Appeal No. 18 of 1903 under section 10 of the Letters Patent.

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of the plaintiff's judgment-debtor. *Karalia Nuralhai Mahomedbhai v. Mansukhrum Takhtchand* (1) followed; *Hormasji Menckji Dadachanji v. Keshav Purshotam* (2) distinguished.

THE circumstances out of which this appeal arose were the following. One Musammat Mughlani Khanam in the year 1883, after her husband's death, obtained a decree against her son Naim Beg and three other sons for recovery of her dower amounting to Rs. 12,000. In execution of that decree she realized sums amounting to Rs. 10,800, leaving a balance of Rs. 1,200 still due. A parol agreement was entered into between the decree-holder and her sons for the transfer to her of certain immovable property in satisfaction of the amount remaining due under the decree, and in pursuance of this agreement the decree-holder was put into possession in December 1889 and the decree was thus fully satisfied. There was no writing embodying the contract and no conveyance was ever in fact executed. About the year 1894 one Chaudhri Ram Bakhsh, who had obtained a money decree against Naim Beg, attached in execution of that decree the property which had come into the possession of Musammat Mughlani Khanam under the agreement above referred to. She took an objection to the attachment under section 278 of the Code of Civil Procedure; and her objection was allowed. Thereupon the attaching creditor instituted a suit praying for a declaration that the property was liable to attachment and sale in execution of his decree against Naim Beg. The Court of first instance (Munsif of Agra) dismissed the suit and the plaintiff's appeal was dismissed by the District Judge. The plaintiff then appealed to the High Court. This appeal coming before a single Judge of the Court was dismissed by a judgment, which, after setting forth the facts of the case concluded with the following remarks:—"The plea taken in appeal here is that the transfer to the respondent of the property in suit amounted to a sale within the meaning of section 54 of the Transfer of Property Act and that as no registered instrument was executed the transfer cannot be recognised. In my opinion the plea is without force. The transfer was not a sale: it was a transfer of the property in satisfaction of a decree of Court. Having regard to the

(1) (1900) I. L. R., 24 Bom., 400. (2) (1893) I. L. R., 18 Bom., 13.

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provisions of section 2, clause (d), of the Transfer of Property Act, the provisions of the Act do not apply. This is sufficient for the decision of this appeal, which I dismiss with costs."

Against this judgment the plaintiff appealed under section 10 of the Letters Patent.

Dr. *Satish Chandra Banerji*, The Hon'ble Pandit *Madan Mohan Mulawiyā* and Dr. *Tej Bahadur Sapru*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C. J., and BURKITT, J. :—The facts of this appeal are shortly as follows. Musammat Mughlani Khanam in the year 1883, after her husband's death, obtained a decree against her son Naim Beg and three other sons for recovery of her dower amounting to Rs. 12,000. In execution of that decree she realized sums amounting to Rs. 10,800, leaving a balance of Rs. 1,200 still due. A parol agreement was entered into between her and her sons for the transfer of the property in dispute in the suit, out of which this appeal has arisen, in satisfaction of the amount of the decree so remaining unpaid, and in pursuance of that agreement Musammat Mughlani Khanam was put into possession of the property in December, 1889, and the decree was thus fully satisfied. There was no writing containing the contract, and no conveyance was ever as a matter of fact executed. In or about the year 1894 the plaintiff Chaudhri Ram Bakhsh obtained a money decree against Naim Beg, and in execution of that decree attached the property which was, and is now, in the possession of Musammat Mughlani Khanam under the agreement to which we have referred. She took an objection to the attachment under section 278 of the Code of Civil Procedure, and her objection was allowed; and thereupon the suit out of which this appeal has arisen was instituted on the 24th of July, 1900, praying for a declaration that the property in question was liable to attachment and sale in execution of the plaintiff's decree. The Court of first instance dismissed the claim, and on appeal this decree was confirmed. Thereupon an appeal was presented to this High Court which was dismissed on the 5th of March, 1903. The plea taken in appeal by the appellant was that the transfer to Musammat Mughlani Khanam amounted to a sale

within the meaning of section 54 of the Transfer of Property Act, and that as no registered instrument was executed the transfer could not be recognised. The learned Judge overruled this plea, holding that "the transfer was not a sale; it was a transfer of the property in satisfaction of a decree of Court. Having regard to the provision of section 2, clause (d) of the Transfer of Property Act, the provisions of the Act do not apply." The appeal was accordingly dismissed.

We may at the outset say that we are unable to agree with the learned Judge of this Court in the reasons assigned by him for dismissing the appeal. The transfer was not made by any Court executing the decree for dower. There was merely an agreement by the parties on the one side to sell and on the other side to buy the property in satisfaction of the amount remaining due on foot of the decree followed by delivery of possession. In the conclusions, however, arrived at by the learned Judge we are in accord with him. It has been found by the lower Courts that there was a *bond fide* contract between Musammat Mughlani Khanam and her judgment-debtors for the purchase of the property for the sum due to her on foot of her decree. The amount of the decree so due was thus discharged and possession was given to the purchaser and has been retained by her ever since. We have not merely a contract of sale established, but possession given and payment of the purchase money made under that contract. There is something more than the mere contract. There is the payment of the purchase money and possession given under the contract, and the last clause of section 54 of the Transfer of Property Act does not therefore apply. That clause declares that a contract for the sale of immovable property "does not of itself create any interest in or charge on such property." Under these circumstances the point for our decision is whether or not Naim Beg has any interest in the property which can now be attached and sold in execution of the appellant's decree against him; or, in other words, can we declare that the property in suit can be taken and sold as the property of Naim Beg? On the findings of fact arrived at by the lower Court, which we have set forth above, we can come

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to no other conclusion than that Naim Beg has no such interest, and had none on the day when his suit was instituted. This view is supported by the decision of Jenkins, C. J., in the case of *Karalia Namubhai Mahomedbhai v. Mansukhrām Vakhatchand* (1). The earlier decision of the Bombay High Court in the case of *Hormasji Manekji Dadachanji v. Keshav Purshotam* (2) does not appear to us to apply, inasmuch as in that case the title attempted to be set up against a purchaser of property at a sale in execution of a decree was based upon a contract for sale in writing executed a fortnight previously and not registered, and under which possession of the property had not been given and only a small portion of the purchase money had been paid.

Upon the facts which have been established in the case before us we hold that the judgment-debtor Naim Beg has no interest in the property in dispute which can be attached and sold in execution of the plaintiff's decree. We therefore dismiss the appeal with costs.

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January 5.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

EMPEROR v. TOTA AND OTHERS.*

*Act No. III of 1867 (Gambling Act), section 13—Gaming in public place—
Seizure of money as well as instruments of gaming not authorized.*

Held that where persons are found gaming in a public place under circumstances to which section 13 of Act No. III of 1867 is applicable, although instruments of gaming, &c., may be seized by the police, there is no authority for the confiscation of money found with the persons arrested. *Sant and Ram Sahai v. Queen-Empress* (3) followed.

TOTA and a large number of other persons were found gambling in a public place and were convicted by a Magistrate of the first class under section 13 of Act No. III of 1867 and sentenced some to one month's rigorous imprisonment and others to fines. In addition a considerable sum of money

* Criminal Reference No. 726 of 1903.

(1) (1900) I. L. R., 24 Bom., 400. (2) (1893) I. L. R., 18 Bom., 13.
1 (3) Panj. Rec., 1891, Cr. J., p. 60.