

have the usual ten days for filing objections to the findings on the issues. The Judge shall be at liberty to hear any evidence which may be adduced by either side for the determination of the issues.

*Case remanded.*

1903

W. BUTLER  
v.  
ADAMJI  
BAHURA.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

SADHO CHAUDHRI AND ANOTHER (PETITIONERS) v. ABHENANDAN

PRASAD AND ANOTHER (OPPOSITE PARTIES).\*

1903

June 27.

*Civil Procedure Code, sections 244 and 320—Notification No. 671 of the 30th August, 1880—Execution of decree—Execution transferred to Collector—Private sale—Subsequent sale held by Collector—Remedy of purchasers at private sales.*

Execution of a decree for sale of ancestral property was transferred under the provisions of section 320 of the Code of Civil Procedure to the Collector. Whilst the execution proceedings were pending before the Collector the judgment-debtor privately sold the property, and the purchasers paid over the price to the decree-holder, and such payment was certified to the Civil Court which passed the decree. The decree-holder, however, took no steps to withdraw the execution proceedings from the hands of the Collector, and accordingly the Collector in due course sold the property. Held that under such circumstances the remedy of the first purchasers, *i.e.*, the purchasers by private sale, was by application under section 244 of the Code of Civil Procedure and not by suit, and that such application lay to the Civil Court, and not to the Collector. *Mathura Das v. Lachman Ram* (1) referred to.

THIS was an appeal arising out of proceedings in execution of a decree. One Dilsukh Rai, predecessor in title of Baij Nath, one of the present respondents, held a decree for sale on a mortgage against Lachman Ram and others. The property ordered to be sold being ancestral, the decree was sent to the Collector for execution under section 320 of the Code of Civil Procedure. Before the Collector, however, had effected a sale, the judgment-debtors, on the 20th February 1898, privately sold the property to Sadho Chaudhri and another; and it was alleged that the purchasers discharged the amount of the decree by payment out of court to the decree-holder and such payment has duly certified to the Civil Courts. No steps were taken by the decree-holders

\* Second Appeal No. 706 of 1901, from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 4th of April 1901, confirming an order of Maulvi Muhammad Abbas Ali, Subordinate Judge of Gorakhpur, dated the 4th of August 1900.

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SADHO  
CHAUDHRI  
v.  
ABHENAN-  
DAN  
PRASAD.

to withdraw the execution proceedings from the hands of the Collector, and accordingly the Collector on the 20th of February 1899 sold the property to Abhenandan Prasad. On this the purchasers at the private sale brought a suit in the Civil Court to set aside the sale; but that suit was defeated, the Judge holding that the matter was not for a suit at all but for an application under section 244 of the Code of Civil Procedure; and the plaintiffs' prayer that the suit might be treated as an application under section 244 was rejected. The plaintiffs then presented an application under section 244 to the Civil Court. The application was dismissed by the Court of first instance (Subordinate Judge of Gorakhpur) and on appeal the District Judge confirmed the order of the lower Court. The applicants therefore appealed to the High Court.

*Mr. R. Malcomson*, for the appellants.

*Munshi Gobind Prasad*, for the respondents.

BLAIR and BANERJI, JJ.—This appeal arises out of an application under section 244 of the Code of Civil Procedure, asking the Court to set aside a sale held by the Collector on the ground of fraud under the following circumstances:—The predecessor in title of Baijnath Prasad, respondent, held a decree for sale upon a mortgage. The property being ancestral, that decree was transferred for execution to the Collector. The allegation is that before the Collector had effected the sale, the judgment-debtor privately sold the property to the appellants here. The sale took place on the 20th of February 1898. It is said that the purchaser discharged the amount of the decree by payment out of Court to the decree-holder, and such payment was duly certified to the Civil Court. No steps were taken by the decree-holder to withdraw the execution proceedings from the hands of the Collector, and, accordingly, on the 20th of February, 1899, the Collector proceeded to sell, and did sell, to the first respondent, it is said, for a nominal sum. Thereupon the appellants brought a suit in the Civil Court to set aside the sale, but that suit was defeated, the Judge holding that the matter was not for a suit at all, but for an application under section 244 of the Code of Civil Procedure. That decree was allowed to become final. The appellants then asked the

Court to treat the suit as an application under section 244. That was a prayer which the Court might in its discretion have granted. It refused, however, to do so, on the ground that the execution proceedings having been transferred to the Collector, the Court was *functus officio*, and had no power to deal with the matter. The appellants then presented an application under section 244 to the Civil Court. Both the Courts below have dismissed the application. It is from the order of the first appellate Court that the present appeal is filed. The appellate Court dismissed the application on the following grounds:—(1) That the auction purchaser was not a party to the original suit or the representative of a party, and against him the appellants ought to have proceeded by a regular suit; (2) that appellants originally did proceed by suit, and the Court in that suit held that section 244 was a bar, and declined to treat the suit as an application under section 244; that order, the Court holds, is a bar to the present application; (3) that the decree having been sent to the Collector's Court for execution, the Civil Court is *functus officio*.

Against these grounds of decision the present appeal is brought, and Mr. Gobind Prasad supports only the third. The first is opposed to the ruling of this Court in *Mathura Das v. Lachman Ram* (1). The second ground is, in our judgment, untenable. It was within the discretion of the Court below to treat or not to treat the suit as an application, and therefore it is impossible to say that any bar to a subsequent formal application was raised by the Court's refusal to exercise its discretion. On the third point, in our opinion, no possible contention can be successfully raised. Rules have been published in the notification of Government No. 671, dated the 30th of August, 1880, in relation to execution by the Collector of a decree of a Civil Court. Rule 2 provides that if, after the decree has been transmitted, any claim to the property to be sold or any objection be preferred, the Court which ordered the sale may recall the decree, and proceed to dispose of the claim or objection. If such claim or objection be preferred to the Collector, the claimant or objector shall be referred by him to the Court which

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ordered the sale. This rule applies to the case where the Collector has still seisin of the execution proceedings. In the present case the papers have been returned with a report to the Civil Court, and the powers of the Collector are absolutely exhausted. It is manifest, then, that an application to the Collector would be to bring the case *coram non judice*. Even if the Collector was seised of the execution proceedings, the rule referred to would preclude him from entertaining an application like the present by which an objection is made to the sale of the property. Rule 19 provides that the Collector after confirmation of the sale held by him shall retransmit the decree, and all the papers received by him, to the Court by which the decree was transmitted, and that all subsequent proceedings in connection with the decree and delivery of possession to the purchaser shall be taken under the orders of the Court. That in itself is a sufficient answer to Mr. *Gobind Prasad's* contention. After the Collector had returned the papers, the only Court to which the applicant could have had recourse, and which had seisin of the case at all was the Civil Court by which the decree had been passed. According to clause XII of rule 17 the Collector could set aside a sale only on the ground of material irregularity in publishing or conducting it. But he had no power to set aside a sale on any other ground. The present application to the Court is an application to set aside the sale on the ground of fraud, and in our opinion it is an application which could not have been made to the Collector, and could only have been brought to the Court where in point of fact it was brought. We therefore allow the appeal, set aside the decrees of both the lower Courts, and remand the case under section 562 of the Code of Civil Procedure to the Court of first instance for trial on the merits. The appellants will have their costs of this appeal. Other costs will follow the event.

*Appeal decreed and cause remanded.*