

respondents are not represented here; but there is a finding that the price that the appellant must pay is Rs. 325, for the property of which he seeks pre-emption. We decree this appeal, set aside the decrees of the Courts below and grant the appellant a decree declaring his right to pre-empt upon payment of Rs. 325, on or before the 2nd of August next. If that amount is paid within the time, he will get his costs in all Courts, and will get possession. If the amount be not paid within such time the suit will stand dismissed with costs in all Courts.

Appeal decreed.

1906

POJKAR
SINGH
v.
MUHAMMAD
HUSAIN
KHAN.

1906

May 4.

Before Mr. Justice Banerji and Mr. Justice Aikman.

GAYA PRASAD MISR AND ANOTHER (OPPOSITE PARTY) v. RANDHIR SINGH (JUDGMENT-DEBTOR) AND ANOTHER (DECREE-HOLDER).*

Civil Procedure Code, section 244(c)—Application to set aside sale on the ground of fraud—Previous suit with same object—Procedure—Estoppel.

Section 244(c) of the Civil Procedure Code governs a case in which a person seeks to set aside an auction sale on the ground of fraud and on the ground that the decree-holder himself held a mortgage on the property brought to sale.

This plea had been urged successfully by the appellant in a regular suit brought by the present respondent, but the former now pleaded that the remedy should be by suit and not by execution proceedings.

Per AIKMAN, J.—The appellant cannot be allowed to go behind the issue decided in the course of the previous litigation.

THE facts of this case are thus stated in the judgment of the lower appellate Court:—

Lachman Singh, father of Randhir Singh, usufructuarily mortgaged 68 bighas 3 biswas out of his three-anna share in mauza Garwan to Gajadhar Singh, but did not give possession. The mortgagee brought a suit for possession, and obtained a decree for possession as also for mesne profits and costs. In execution of the decree for mesne profits and costs he caused the three-anna share to be sold, and it was purchased on the 20th of June, 1889, by one Sita Ram. Randhir Singh filed a regular suit

* Second Appeal No. 753 of 1905, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 31st of March, 1905, confirming the decree of Babu Jotindro Mohan Bose, Munsif of Mirzapur, dated the 3rd December, 1904.

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for cancellation of the sale upon the allegation that he was a minor at the date of sale and his guardian had died during the course of the execution proceedings and no other guardian had been appointed. Further the 68 bighas 3 biswas had been sold in contravention of section 99 of the Transfer of Property Act. The Subordinate Judge who tried this suit held that it was barred by virtue of the provisions of section 244 of the Code of Civil Procedure and dismissed it. Thereupon the judgment-debtor, Randhir Singh, renewed his objections to execution of the decree in the form of an application under section 244 of the Code of Civil Procedure. In this he was successful as to the 68 bighas 3 biswas, and in appeal the order of the first Court was upheld. The opposite parties, sons of Sita Ram the auction-purchaser, thereupon appealed to the High Court.

Mr. A. E. Howard, for the appellants.

Dr. Tej Bahadur Sapru, for the respondents.

BANERJI, J.—The only question raised in this appeal is whether the matter in controversy between the parties is one which could be determined under section 244 of the Code of Civil Procedure or whether the respondent Randhir Singh's remedy was a separate suit. Randhir Singh sought to set aside the auction sale, at which the appellant purchased his property, on the grounds that fraud had been committed, and that, having regard to section 99 of the Transfer of Property Act, the decree-holder was not entitled to bring the property to sale, inasmuch as he himself held a mortgage over it. Both these questions are in my judgment questions which relate to the execution, discharge or satisfaction of a decree within the meaning of clause (c) of section 244 of the Code of Civil Procedure. This has been held in a number of cases to which I do not deem it necessary to refer. I may also add that when a regular suit was brought by the respondent, Randhir Singh, the plea of the appellant was that Randhir Singh's remedy was an application under section 244 of the Code of Civil Procedure, and that plea prevailed. Holding the view that I do on the question of the applicability of section 244, I deem it unnecessary to determine whether the decision in that case can operate as *res. judicata*. In my judgment there is no force in this appeal and I would dismiss it with costs.

AIKMAN, J.—I am of opinion that the decision of the Courts below is right. In my judgment the case is one clearly falling within the purview of section 244, clause (c) of the Code of Civil Procedure. I doubt very much whether it is open to the appellant to put forward the plea which he now urges. The respondent, Randhir Singh, brought a regular suit to have the sale set aside. A plea was taken by the present appellant, that a regular suit would not lie, and that Randhir Singh's remedy was an application under section 244. The Subordinate Judge sustained the appellant's objection and dismissed the suit. Now, when Randhir Singh makes an application under section 244, the appellant turns round and says, 'You cannot apply under section 244, you must bring a regular suit.' In my opinion this issue was decided as between the parties in the previous litigation, and I am of opinion that the appellant cannot go behind that decision. To allow him to do so would, to use Lord Bowen's expression in *Gandy v. Gandy* (1), be "playing fast-and-loose with justice." I concur in taking that the appeal should be dismissed.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1906

GAYA
PRASAD
MISR
v.
RANDHIR
SINGH.

1906
May 17.

Before Mr. Justice Banerji and Mr. Justice Aikman.

EMPEROR v. DWARKA KURMI.*

Criminal Procedure Code, section 288—Evidence—Statements before committing Magistrate retracted before Court of Session.

In a capital case certain witnesses, who had stated before the committing Magistrate that they had seen the accused striking the deceased, withdrew their statements before the Court of Session and gave evidence exculpating the accused. The Sessions Judge, considering the evidence given before him by these witnesses to be untrue and acting under section 288 of the Code of Criminal Procedure, admitted in evidence the statements of these witnesses made before the committing Magistrate.

Held that such statements were, rightly admitted and when admitted were on the same footing as the other evidence on the record. *Queen-Empress*

* Criminal Appeal No. 290 of 1906.

(1) (1885) L.R., 30 Ch. D., 57.