

1886 the day of sale, under the Civil Procedure Code, he is bound to follow the order in which the property, upon which the rent has accrued, and other properties belonging to the tenant, may be brought to sale, as indicated in the above sections.

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In view of the opinion expressed by the Divisional Bench in the case referred to above, we should, had we considered the question raised in this appeal one of general importance and likely to recur, have thought it proper to refer this case to a Full Bench. But Act VIII of 1869 has been repealed, and an entirely new Act has come into operation, and so we think a reference to a Full Bench is unnecessary.

We direct that the order of the District Judge, so far as the sale of the immoveable properties is concerned, be set aside, and that of the Sub-Judge restored.

The appellants must have their costs in all Courts.

J. V. W.

Appeal allowed.

PRIVY COUNCIL.

P. C.*
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July 9.

REWA MAHTON (DEFENDANT) v. RAM KISHEN SINGH (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Civil Procedure Code, 1877, s. 246 (1)—Execution of cross-decrees—Jurisdiction—Bond fide purchaser—Presumption of validity of order for sale.

If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in s. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution.

Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bond fide*, and for fair value: *Held*, that the mere existence of a cross-decree for a higher amount in favor of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale.

“ *Present*: LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.

(1) Section 246 of Act XIV of 1882,

APPEAL from a decree (21st April 1882) of the High Court, reversing a decree (3rd August 1880) of the Subordinate Judge of Bhagalpur.

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This was a question as to the construction of s. 246 of the Code of Civil Procedure, Act X of 1877, providing that, if cross-decrees between the same parties, and for the payment of money, are produced to the Court, execution shall be taken out only by the holder of the decree for the larger sum, and only for the balance.

The decree of the High Court, against which this appeal was preferred, set aside a sale made in execution of one Khub Lal's decree against Mussamut Radheh Koeri, now deceased, and represented by the respondent, Ram Kishen Singh.

The High Court did not examine the question of fraud, their opinion in regard to s. 246 rendering it unnecessary so to do. Briefly stated, the circumstances connected with the sale were that Khub Lal had originally taken a lease of mouzah Mokandpur from Radheh Koeri, paying to her an advance, to be held in deposit by her as security for the rent; and cross suits resulted in 1877. The lessor sued for two years' rent, and the lessee for a refund of the advance, or zuripeshgi. The Munsiff of Jamoi heard the suits together, recording one judgment (7th September 1877), but refusing to set the one sum off against the other before decree; and making two decrees, one for Rs. 788 in favor of Radheh Koeri; and the other for Rs. 661 in favor of Khub Lal. The latter on execution issued by the former (10th November 1877), was imprisoned for a period, but released on her failure to pay diet-money. Another application (26th March 1878) made by her for execution of her decree, gave no credit for the amount due by her to Khub Lal; but, amongst other things, asked for the attachment and sale of his decree against her.

This application was refused by the Munsiff, exercising his discretion under s. 230 of Act X of 1877; but on appeal was granted by the District Judge (26th July 1878), and from this order Khub Lal appealed to the High Court. Pending this appeal, Khub Lal applied (31st December 1878) for the execution of his decree by the attachment and sale of Koeri's interest in the said mouzah Mohamda. This application was made in the same

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Court in which she was already carrying out execution of her cross-decree. The Court, without applying s. 246 to the case, made an order (4th November 1878) for the sale of Mohamda, which accordingly took place, resulting in the purchase of it by the appellant.

Radheh Koeri then applied, under s. 311 of the Code, to have the sale set aside, alleging that Khub Lal's decree ought not to have been executed, her own decree standing against him in the same Court for a larger amount. She alleged that the execution proceedings had been fraudulently carried on, and the property sold for about half of its value. The Munsiff of Jamoi found that there had been no fraud, and rejected the application, passing an order, under s. 312, confirming the sale. This was upheld on appeal (22nd September 1879), the District Judge holding that, after a sale has taken place, the Court having jurisdiction, and the purchaser having become an interested party, inquiries as to irregularity must be restricted, under s. 311, to what had occurred in publication of the attachment, the giving notice, and holding the sale, with consequent material injury to the judgment-debtor. Of the latter there was none here.

Radheh Koeri having failed in getting the sale set aside under s. 311, instituted the present suit. The proceedings thereupon having been fully stated in the judgment on this appeal, are not here recounted. The High Court reversed the decree of the Subordinate Judge, who dismissed the suit. The Judges determined the question upon s. 246 alone, holding that the effect of that section was to render the sale invalid under the circumstances.

For the appellant, Mr. *C. W. Arathoon* argued that the High Court had misapplied s. 246, Act X of 1877, disregarding the important consideration that Rewa Mahton was a *bona fide* purchaser, who had paid a fair value for the property sold by the Court's order in execution of decree. As against him, there were no grounds for setting aside the sale.

The respondent did not appear.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal from a decree of the High

Court at Calcutta in a suit in which the respondent, Mussamat Radheh Koeri, was the plaintiff, and Khub Lal and the appellant Rewa Mahton, and others, were the defendants. Koeri died pending this appeal, and Ram Kishen Singh, her son and heir, was substituted for her. It appears that on the 7th of September 1877 the Munsiff of Jamoi, in the district of Bhagalpur, made two decrees, one in favour of the respondent against Khub Lal for Rs. 788-0-9, and the other in favour of Khub Lal against her for Rs. 661. On the 10th November 1877 the respondent took out execution against Khub Lal for the whole amount of her decree without giving him any credit for the Rs. 661 which he had recovered against her. Under that execution Khub Lal was arrested and detained in prison for a period of about two months, at the expiration of which time he was released on the failure of the respondent to lodge the necessary diet money. Subsequently, on the 26th March 1878, the respondent made another application for execution against Khub Lal upon her decree, and in that application she gave him no credit for the Rs. 661 which he had recovered against her. Upon that execution being granted, an application was made to the Munsiff by Khub Lal to set it aside. The Munsiff granted that application, but his decision was, on the 26th July 1878, reversed by the District Judge, who held that the respondent was entitled to execute her decree for Rs. 788, notwithstanding all that had previously taken place. Upon that Khub Lal appealed to the High Court, and whilst the matter was pending before that Court, *viz.*, on the 31st of August 1878, he applied for execution against the respondent for the total amount of his decree for Rs. 661. The execution was issued, and under it the property of the respondent, consisting of a 2-annas share of mouzah Mokandpur Mohamda, was attached and sold to the appellant for a sum of Rs. 9,775. Application was made to set aside that sale under ss. 311 and 312 of Act X of 1877. The Munsiff disallowed the application and confirmed the sale, and his order was on appeal affirmed by the Judge. By the last paragraph of s. 312 it is enacted that "No suit to set aside on the ground of such irregularity an order passed under this section, shall be brought by the party against whom such order has been made."

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The present respondent, however, brought a regular suit against Khub Lal, and the present appellant, the purchaser under the execution, and others, alleging that, owing to her having a decree against Khub Lal for an amount greater than that of his decree against her, the latter decree was not fit to be executed; that the sale under it was contrary to the powers of the Court, and was not binding upon her; and that the purchaser acquired no right under the sale; and, further, that the purchase by the present appellant took place in collusion with Khub Lal; that Khub Lal was really the purchaser; that he, by fraud, had kept her from knowing that the execution had issued; and consequently that the sale in execution ought to be set aside. She prayed: "(1). That the Court will be pleased to hold that the processes of execution of decree of Khub Lal, the defendant No. 1, were carried out entirely in contravention of law; and that in reality, according to law and justice, the defendant aforesaid had nothing to obtain from your petitioner the plaintiff; and that the sale which has been held is invalid. (2). That the Court will be pleased to hold that the processes of the sale aforesaid, and the sale in question, were executed and held fraudulently. (3). That the Court will be pleased to cancel this sale." Written statements were put in on the part of the several defendants, and issues were settled. The Subordinate Judge in the first instance settled two issues in bar. The first was: "Is this case in the regular department,"—that is, is this suit which is brought as a regular suit—"unfit for hearing under the last portion of s. 312 of the Code of Civil Procedure, or not?" Second: "Was it necessary for the defendant, first party, to set off the amount of the decree of the plaintiff against his own decree under s. 246 of the Code of Civil Procedure, or not?" Subsequently he settled further issues of fact? He said: "To-day the arguments of the pleaders for both parties on the first issue were heard. After hearing the arguments of the pleaders for both parties, I come to the conclusion that issues on facts also ought to be framed; that after receiving the evidence I shall try, on all the issues, as to whether this sale has been held fraudulently or not, and determine whether, in case fraud be proved, a regular suit will lie for cancelment of the sale in question." Then he settled

the following issues of fact: "1st. Did the defendant No. 1 take the proceedings for execution of decree and service of attachment processes and a sale notification fraudulently (and) surreptitiously, with a view that the plaintiff might not be aware of it; or were the proceedings of execution of decree and the issue of attachment processes and sale notifications executed in a *bond fide* manner without fraud? 2nd. Is the defendant No. 2—that is the present appellant—"furzi for the defendant No. 1 in the auction purchase, or is he the real purchaser; and were the defendants Nos. 2 and 3 aware of the fraud stated by the plaintiff at the time of the auction purchase or not? 3rd. Has the property sold at auction been sold for a small value owing to the fraud alluded to, or not?" Those issues came on for trial. Witnesses were heard on both sides, and the Judge delivered judgment, by which, after stating that the pleas in bar were overruled by his predecessor, he decided in favour of the defendants. With regard to the principal point as to the fraud, he said: "There is no proof of the allegation that Khub Lal purchased the share in question in the name of Rewa Mahton." And again: "In my opinion Rewa Mahton is the real purchaser, who made the other defendant, Omed Ali, a partner in his purchase. I do not think that Khub has any interest in the property." He also held that the property was not sold for an inadequate price. An appeal was preferred to the High Court, and that Court, without entering into the question of fraud or no fraud, but assuming that the defendant, the present appellant, was a *bond fide* purchaser at the sale, proceeded to consider the question whether the sale in execution was valid or not in consequence of the Munsiff's having granted Khub Lal's execution when the plaintiff held a decree for a larger amount against him.

That question depends upon s. 246 of the Code of Civil Procedure, Act X of 1877, which enacts as follows: "If cross-decrees between the same parties and for the payment of money be produced to the Court"—that is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not,—"execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as

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remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum, as well as satisfaction on the decree for the smaller sum."

In this case the plaintiff's decree was not brought before the Court when Khub Lal applied for execution. At that time he brought before the Court only his own decree, and the Court ordered that an attachment should issue to satisfy his judgment for Rs. 661, and the property was attached. We cannot in this suit enter into the question whether the decisions upon the petition to set aside the sale under ss. 311 and 312 were correct or not. Those decisions cannot, in consequence of s. 312, be impeached in this suit on the ground of any irregularity which was the subject of those decisions.

The High Court determined the question simply upon s. 246. They said: "The provisions of s. 246 are explicit, that if cross-decrees between the same parties and for the payment of money be produced to the Court, execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as remains after deducting the smaller sum. It was not competent to the Munsiff by his judgment to modify this provision of the law, even if it were his intention to do so, which is by no means clear." The High Court does not say that the decree of the plaintiff was brought before the Munsiff, or that the two decrees were before him at the time when he awarded execution for the smaller decree. They go on: "Nor does it appear to us that there was anything in the plaintiff's conduct which could render legal and valid proceedings of the defendant, which were without the sanction of law. When the defendant, on the 31st August, applied for execution of his cross-decree for a smaller amount he must have been aware that the plaintiff's decree had been produced to the Court, and that since the order of the Appellate Court, 26th July 1878, it was capable of execution. The defendant accordingly had no right to execution, except as provided by s. 246, and the whole of the subsequent proceedings taken in execution of the defendant's decree were, in our opinion, a nullity, and must be set aside." The Court, therefore, notwithstanding the finding of the lower Court that the defendant—the present

appellant—was a *bond fide* purchaser at the sale under the execution, and without themselves entering into the question of fraud or no fraud, held that the execution issued by the Munsiff and all the subsequent proceedings, were a nullity, and must be set aside. The defendant appellant purchased *bond fide*, and for a fair value, property exposed for sale under an execution issued by a Court of competent jurisdiction upon a valid judgment.

Their Lordships are of opinion that the High Court came to an erroneous decision with regard to the construction of s. 246, and that the judgment of the High Court in that respect must be set aside. A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues.

It would have been more satisfactory if in this case, which was one appealable to Her Majesty in Council, the High Court had not decided the case merely upon the construction of s. 246 without expressing their opinion upon the other issues which were raised and determined by the Subordinate Judge. Their Lordships, being of opinion that the decision of the High Court with reference to s. 246 is erroneous, have been obliged to determine the other issues, and for that purpose to go through the evidence in the absence of the respondent, who did not appear before them on the argument of the case, without having the advantage of any expression of the High Court's opinion as to the effect of that evidence. If the High Court had determined the other issues and had concurred with the Subordinate Judge in his findings, the case would have fallen within the

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rule of concurrent findings of fact, and the examination of the evidence by their Lordships would in all probability have been unnecessary.

Their Lordships having examined the evidence very carefully, have come to the conclusion that the Subordinate Judge was correct in holding that there was no fraud; that the defendant was a *bonâ fide* purchaser under the execution; and that the property was not sold for an inadequate price.

Under these circumstances their Lordships will humbly advise Her Majesty to dismiss the appeal to the High Court with costs, to reverse the judgment of that Court, and to affirm the decision of the Subordinate Judge. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Porter and Mr. Justice Agnew.

1886
 June 2.

RAGHUNATH PERSHAD (DECREE-HOLDER) *v.* ABDUL HYE AND
 ANOTHER (JUDGMENT-DEBTORS).*

Limitation Act (XV of 1877), Art. 179 (para. 2)—Appeal against part of decree—Execution against judgment-debtors who were not joined in the appeal.

By a decree of a Court of first instance, dated the 16th August 1880, Rs. 15,260-5-6 was found due against *A*, and Rs. 20,099-2-6 against *A* and *B* jointly, the suit being dismissed as against two other defendants who were alleged to have been sureties. The plaintiff appealed against so much of this decree as dismissed the suit against the alleged sureties, not making either *A* or *B* parties respondents; this appeal was dismissed on the 1st May 1885. On the 27th April 1885 plaintiff applied for execution against *A* and *B*: *Held* that the application was barred under Art. 179 of the Limitation Act.

THIS was a suit brought by the plaintiff against Wajiruddin, Abdul Hye, Mussamut Batulan, Abdul Huq and Abdus Sanad,

* Appeal from Order No. 297 of 1885, against the order of Moulvi Mahomed Nurul Hosein, Khan Bahadur, Subordinate Judge of Sarun, dated the 25th of July 1885.