

form prescribed by section 88 of the Transfer of Property Act. In other respects the decree will stand. The plaintiff appellants will have the costs of this appeal as against the mortgagors, the same to be added to the mortgage debt.

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LALMAN
v.
MOHAR
SINGH.

Appeal decreed.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

KASTURA KUNWAR (OBJECTOR) v. GAYA PRASAD AND ANOTHER
(OPPOSITE PARTIES).*

1906

November 27.

Civil Procedure Code, sections 244 and 318—Execution of decree—Procedure—Appeal—Dispute between two judgment-debtors as to right to property sold in execution.

In execution of a decree against *K* and *J* certain property of the judgment-debtors was sold, and was purchased by *G P* and this sale was confirmed. *G P* then applied under section 318 of the Code of Civil Procedure asking that *J* might be substituted for the applicant and possession given to her. To this application *K* objected, on the ground that she, at some time prior to the execution of the decree and sale of the property, had given a certain sum of money to *J*, and that *J* had misappropriated this money and had purchased with it the property which was sold in execution of the decree. *Held* that no question was raised falling within the purview of section 244 of the Code of Civil Procedure and no appeal would lie from the order allowing the auction purchaser's application under section 318.

In this case in execution of a decree held by one Sheo Prasad Singh against Musammat Kastura Kunwar and Musammat Jaleba Kunwar the decree-holder caused certain property to be sold. The property so sold was purchased by one Gaya Prasad. The money was duly paid and admittedly reached the right hands. The sale was confirmed, and a sale certificate issued in favour of Gaya Prasad. Gaya Prasad then made an application under section 318 of the Code of Civil Procedure asking that the name of Jaleba Kunwar might be substituted in the sale certificate for his own and possession delivered to her. To this application Kastura Kunwar objected, alleging that at some time prior to the execution of the decree and sale of the property she had given a certain sum of money to Jaleba Kunwar and that Jaleba Kunwar had misappropriated that money and with it had purchased the property which was sold in execution of the decree. The Court (District Judge of Ghazipur) disallowed Kastura Kunwar's objections and directed that Jaleba Kunwar should be

* First Appeal No. 101 of 1906, from a decree of Pandit Sri Lal, District Judge of Ghazipur, dated the 30th of March 1906.

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put into possession of the property sold, as asked by the certified purchaser Gaya Prasad. From this order Kastura Kunwar appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

RICHARDS, J.—The facts out of which this appeal arises are shortly as follows:—One Sheo Prasad Singh obtained what was admittedly equivalent to a decree against Musammat Kastura Kunwar and Musammat Jaleba Kunwar. In execution of that decree certain property of the judgment-debtors was taken in execution and sold, one Gaya Prasad being the auction purchaser. The money was duly paid and has admittedly reached the right hands. The sale was duly confirmed and a sale certificate granted. Gaya Prasad then made an application (which has led to this appeal) under section 318 of the Code of Civil Procedure. Musammat Kastura Kunwar objected to an order being made for the delivery of possession on this application. We may mention here that Gaya Prasad in his application for delivery of possession asked that Musammat Jaleba should be substituted for him and possession given to her. The grounds of objection sought to be put forward by Musammat Kastura were that she, at some time prior to the execution of the decree and sale of the property, had given a certain sum of money to Musammat Jaleba, and that Musammat Jaleba had misappropriated this money and had purchased with it the property which was sold in execution of the decree. It is admitted here that the decree was properly obtained, that the property was properly attached and sold, and that the sale cannot and ought not to be set aside. Under these circumstances it is extremely difficult to see how the question of misappropriation of a sum of money by Musammat Jaleba relates in any way to the execution, discharge or satisfaction of the decree. If the Court executing entertained and heard the objection put forward by Musammat Kastura and found her allegations proved, it could not possibly adjust matters between the parties save by giving a personal decree to Musammat Kastura against Musammat Jaleba. This the Court executing the decree clearly could not do. A great number of cases have been cited by Mr. *Agarwala* in the course of his careful and able argument and

he has urged that it is not necessary to have any person representing the plaintiff, and that if disputes arise between judgment-debtors or their representatives and if the matter relates to the execution, discharge or satisfaction of the decree, the matter is one under section 244 of the Code of Civil Procedure and ought to be decided by the Court executing the decree. The facts of this case are not identical with the facts of any of the cases that have been cited, and in my judgment there being no application by Musammat Kastura to set aside the sale or execution, the point raised by her does not relate to the execution, discharge or satisfaction of the decree or to the stay of execution thereof. I consider that the dispute between her and Musammat Jaleba can only be settled in an independent suit brought for that purpose. It must be admitted that unless the appeal can be brought under section 244, no appeal lies. I accordingly would dismiss the appeal.

KNOX, J.—I agree. I desire only to emphasize what has already been said that the facts of this particular case are peculiar and our decision relates to these facts only. The person who bid at the sale was one Dwarka Pathak. He, however, purchased for Gaya Prasad, and a sale certificate under section 316 of the Code of Civil Procedure was given in the name of Gaya Prasad. This was a matter of past history before the present applications, out of which the present appeal has arisen, were filed. It was Gaya Prasad who had therefore to apply, and who did apply, to be put in possession of the property which he had purchased. It is true that in his application he says that on the 23rd of June, 1905, he executed a deed of relinquishment in favour of Musammat Jaleba Kunwar, but the execution of this deed of relinquishment will not automatically make Jaleba Kunwar auction purchaser. Gaya Prasad is certified as auction purchaser and remains as auction purchaser until such proceedings may take place, if they can take place, as would bring Jaleba Kunwar on the record. She is on the record at present, but she is there by virtue of being judgment-debtor in the original proceedings and not by virtue of being an auction purchaser. The proceedings relating to the execution of the decree in the present case are between Gaya Prasad, auction purchaser, and Musammat

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Kastura Kunwar, who refuses to give possession. What Musammat Kastura Kunwar really desires is a declaration by the Court that the name of Gaya Prasad, the certified purchaser, has been inserted in the certificate fraudulently, and section 317 of the Code shows that a suit for such a declaration is recognised by law. There is an application by Musammat Jaleba Kunwar asking, not to be brought on the record, but for delivery of possession in her favour. I have said enough to show that the circumstances of the present case are peculiar and in no way on all fours with any of the cases cited, and I agree that this case does not fall within the purview of section 244 (c) of the Code of Civil Procedure.

By THE COURT.—We dismiss the appeal with costs.

Appeal dismissed.

1906

December, 5.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

BINDO (OPPOSITE PARTY) v. SHAM LAL (APPLICANT).*

Act No. VIII of 1890 (Guardians and Wards Act), section 10—Guardian and minor—Discretion of Court as to appointment of guardian.

In this case the High Court set aside the appointment of the father as guardian of his own daughter, aged 10 years, upon the grounds chiefly that the father had married again and that under the circumstances the child was likely to be happier with her maternal grandmother, with whom she had been living since the age of 5, than with her father.

THIS was an application by the father of a minor girl, aged 10 years, to be appointed her guardian. The girl had, according to the wishes of her mother, been living since the age of 5, that is to say, since the death of her mother, with her maternal grandmother, a Hindu lady in good circumstances. The application was opposed by the grandmother upon the grounds mainly that the father had married again, that he was not well off, and that the girl herself was happy with her grandmother and did not wish to go to her father. The District Judge, however, considered that the father's rights were paramount, and made an order appointing him guardian of the girl. Against this order Musammat Bindo, the grandmother, appealed to the High Court.

It may be noted that the father had made a previous attempt by means of a suit in the Munsif's Court to get possession of the

* First Appeal No. 12 of 1906, from an order of D. R. Lyle, Esq., District Judge of Moradabad, dated the 22nd of December 1905.