

ruling in *Queen-Empress v. Makunda* (1), which fully supports the view for which he contends. We have heard what the learned vakil who appears for the accused could say on his client's behalf. We have also read the evidence. In our opinion it clearly proves an offence under section 48, clause (e) of the Excise Act, 1896. We were addressed on the question of sentence. It is apparently the first time that Lachmi Narain has been convicted. He has already been upwards of three weeks in jail and he has paid the fine which was imposed on him. We accordingly allow this appeal, and, setting aside the judgment of acquittal, convict Lachmi Narain of the offence specified above. We sentence him to the term of imprisonment which he has already undergone, and to the fine which he has already paid.

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REVISIONAL CIVIL.

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May 18.

Before Mr. Justice Aikman and Mr. Justice Griffin.

ANANDI KUNWARI (JUDGMENT-DEBTOR) v. AJUDHIA NATH (AUCTION-PURCHASER).*

Civil Procedure Code, sections 310A, 244 and 588—Question relating to the execution, discharge or satisfaction of a decree—Appeal—Auction-purchaser representative of judgment-debtor, not of decree holder.

A purchaser at an auction sale in execution of a decree is the representative of the judgment-debtor, not of the decree-holder. *Mānikka Odayan v. Bajagopala Pillai* (2) dissented from.

Where therefore a judgment-debtor's application under section 310A of the Code of Civil Procedure had been allowed, it was held that no appeal by the auction purchaser would lie, inasmuch as no appeal was given by section 588, nor did the case fall within the purview of section 244 of the Code. *Bashir-ud-din v. Jhori Singh* (3) followed. *Kuber Singh v. Sahib Lal* (4), *Gulzari Lal v. Madho Ram* (5). *Maganlal Mulji v. Doshi Mulji* (6) and *Raynor v. The Mussoorie Bank Limited* (7) referred to. *Imtiaz Begam v. Dhuman Begam* (8) dissented from.

THE facts of this case are as follows :—

One Magan Sahu obtained an *ex parte* decree against Musamat Anandi Kunwari on the 17th of September 1903. In execution of that decree a house was advertised for sale on the

* Civil Revision No. 75 of 1907, from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 25th of May 1907.

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| (1) (1897) I. L. R., 20 All., 70. | (5) (1904) I. L. R., 26 All., 447. |
| (2) (1907) I. L. R., 30 M. d., 507. | (6) (1901) I. L. R., 25 Bom., 631. |
| (3) (1896) I. L. R., 19 All., 140. | (7) (1885) I. L. R., 7 All., 681. |
| (4) (1904) I. L. R., 27 All., 263. | (8) (1907) I. L. R., 29 All., 275. |

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13th of December 1906. On the 11th of December 1906 the judgment-debtor applied to the Court under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. That application was entertained, and the 2nd of February 1907 was fixed for hearing. On the 12th of December 1906 the judgment-debtor deposited in Court Rs. 99 in part payment of the decretal amount and asked that the sale be postponed for one week, promising at the same time to deposit the balance of the decretal amount within the week. The sale was postponed to the 20th of December. On that date, the judgment-debtor not having paid in the balance, the house was sold and purchased by one Ajudhia Nath Ojha for a sum of Rs. 220. On the 16th of January 1907 the applicant deposited in Court Rs. 205, together with a sum sufficient to cover the 5 per cent. on the purchase money allowed by the provisions of section 310A. of the Code of Civil Procedure. This sum with the deposit previously made by her was sufficient to satisfy the amount due under the decree. She asked that the sale might be set aside under section 310A. She added a prayer that the sum be held in deposit pending the disposal of her application to have the *ex parte* decree set aside. On the 2nd of February 1907 her application under section 108 was dismissed. The Court of first instance (Munsif of Gorakhpur) held that, under the circumstances there had been a sufficient compliance with the provisions of section 310A, and made an order setting aside the sale. Against that order the auction purchaser preferred an appeal to the learned District Judge, who entertained it, and in the result set aside the Munsif's order on the ground that the deposit by the judgment-debtor was not an unconditional one. The judgment-debtor then applied to the High Court for revision of the appellate order of the learned District Judge on the ground that no appeal lay to him from the Munsif's order.

The Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, the Hon'ble Pandit *Madan Mohan Malaviya*, Dr. *Tej Bahadur Sapru* and Pandit *Brij Narain Gurtu*, for the applicant.

Babu *Jogindro Nath Chaudhri*, for the opposite party.

AIKMAN and GRIFFIN, JJ.—This is an application for revision of an order of the learned District Judge of Gorakhpur

allowing the appeal of an auction purchaser against the order of the Munsif setting aside a sale under section 310A. of the Code of Civil Procedure. The facts out of which this application has arisen are that one Magan Sahu obtained an *ex parte* decree against the applicant on the 17th of September 1903. In execution of that decree a house was advertised for sale on the 13th of December 1906. On the 11th of December 1906 the judgment-debtor, Musammat Anandi Kunwari, applied to the Court under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. That application was entertained, and the 2nd of February 1907 was fixed for hearing. On the 12th of December the applicant deposited in Court Rs. 99 in part payment of the decretal amount and asked that the sale be postponed for one week, promising at the same time to deposit the balance of the decretal amount within the week. The sale was postponed to the 20th of December. On that date, the applicant not having paid in the balance, the house was sold and purchased by the opposite party Ajudhia Nath Ojha for a sum of Rs. 220. The house is said to be a very valuable one, and from the array of counsel engaged on behalf of the applicant in this Court this would seem to be the case. On the 16th of January 1907 the applicant deposited in Court Rs. 205 together with a sum sufficient to cover the 5 per cent. on the purchase money allowed by the provisions of section 310A. This sum with the deposit previously made by her was sufficient to satisfy the amount due under the decree. She asked that the sale be set aside under section 310A. She added a prayer that the sum be held in deposit pending the disposal of her application to have the *ex parte* decree set aside. On the 2nd of February 1907 her application under section 108 was dismissed. The Court of first instance held that under the circumstances there had been a sufficient compliance with the provisions of section 310A, and made an order setting aside the sale. Against that order the auction purchaser preferred an appeal to the learned District Judge, who entertained it, and in the result set aside the Munsif's order on the ground that the deposit by the judgment-debtor was not an unconditional one. The judgment-debtor has applied to this Court for revision of the appellate order of the learned District Judge on the ground that no appeal

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lay to him from the Munsif's order. In support of the application reliance is placed on the rulings in *Bashir-ud-din v. Jhori Singh* (1) and *Kuber Singh v. Shib Lal* (2). These rulings support the applicant's contention that no appeal is allowed by law against an order under section 310A. On behalf of the opposite party reliance is placed on the ruling in *Imtiaz Begam v. Dhumman Begam* (3), in which a Bench of this Court declined to follow the case reported in I. L. R., 19 All., 140, above referred to, on the ground that the auction purchaser is the representative of the judgment-debtor and that therefore an appeal lay under the provisions of section 244(c) of the Code of Civil Procedure. The ruling in 29 Allahabad contains no reference to the decision of this Court reported in I. L. R., 27 All., 263. It appears to us that the learned Judges, whilst holding that the auction purchaser is a representative of the judgment-debtor, omitted to notice that the contest was between the auction-purchaser and the judgment-debtor. They held that the case fell within the provisions of section 244(c), on the authority of the Full Bench decision of this Court in *Gulzari Lal v. Madho Ram* (4). In that case the contest was between the holder of a mortgage decree and an auction purchaser at a sale held in execution of a simple money decree against a judgment-debtor whose property was ordered to be sold in the suit of the mortgagee. This, it seems to us, is entirely a different case, and clearly falls under section 244(c). We agree with the ruling in *Bashir-ud-din v. Jhori Singh* referred to above. No appeal is allowed by section 588 of the Code of Civil Procedure from an order under section 310A of that Code. The case in our opinion does not come within section 244 of the Code. It was simply a question between the judgment-debtor and a purchaser at an auction sale. It was immaterial to the decree-holder whether he received his money from a deposit made by the judgment-debtor or from the price paid by a purchaser at an auction sale. The learned advocate for the opposite party strenuously contended that, even when the dispute is between the auction purchaser as representative of the judgment-debtor and the judgment-debtor, the case still falls under section 244(c) of the Code of Civil Procedure. Amongst the questions to be determined under

(1) (1896) I. L. R., 19 All., 140. (3) (1907) I. L. R., 29 All., 275.
(2) (1904) I. L. R., 27 All., 263. (4) (1904) I. L. R., 23 All., 447.

section 244 are " questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof." Admitting that in the present case there is question relating to the execution of a decree, can it be said that it is a question arising between the parties to the suit or their representatives? In our opinion it cannot. The same view was taken by the Bombay High Court in *Maganlal Mulji v. Doshi Mulji* (1), in which the learned Chief Justice said :—" Now here the question is simply between the judgment-debtor and the purchaser of his interest in the land, and can it be said that the auction-purchaser is the representative of a party? Certainly not of the decree-holder; therefore he can only claim to be a representative of the judgment-debtor. I doubt whether he can claim this character. But assuming for the sake of argument he can, it would not aid him; for in our opinion the section does not cover a question between a party to the suit and his representative. Therefore we have not the necessary basis for the application of section 244, and as a consequence we hold no appeal lies, because it is only so far as an order under section 310A comes under section 244(c) that it is appealable." We are in agreement with the concluding portion of the above passage. In this view we are supported by what was said in the case of *Raynor v. The Mussoorie Bank, Limited* (2). At page 686 of the judgment the learned Judges remark :—" But, apart from other considerations showing that section 244 is not applicable to a proceeding of this character, it is sufficient here to observe that an application cognizable under that section must be an application between the parties, that is to say, between the parties arrayed against each other as decree-holders of the one part and the judgment-debtors or their representatives of the other. But this is not such a question. It is a controversy of two judgment-debtors *inter se*, and the provisions of section 244 do not apply to the determination of such questions." So here, the controversy is between a judgment-debtor and his representative, and we think it would be straining the language of section 244 to hold that such a dispute falls within the scope of that section. The

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(1) (1901) I. L. R., 25 Bom., 631. (2) (1885) I. L. R., 7 All., 681; at p. 686.

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learned advocate for the opposite party further contended that in this case the auction-purchaser was a representative of the decree-holder, and in support of this view he relies upon the ruling of the Madras High Court in *Manickha Odayan v. Rajagopala Pillai* (1). That ruling supports the learned advocate's contention; but, with all deference to the learned Judges who decided that case, we find ourselves unable to follow them. We are unable to hold that in a case like the present the auction purchaser can be deemed in any way to represent the decree-holder, whose interest in the case closed as soon as he got the money. No appeal is given by section 588 of the Code of Civil Procedure, and for the reasons given above we hold that the case does not fall within the provisions of section 244 of the Code so as to give a right of appeal under that section. The result is that in our opinion the District Judge had no jurisdiction to hear the appeal, and we think his order should be set aside. But as under section 622 of the Code we are empowered in a case like this to pass such order as we think fit, we consider it right to make the order setting aside the decree of the lower appellate Court conditional upon the applicant paying into Court for the opposite party, in addition to the sum already paid, interest on the purchase money (Rs. 220) at the rate of 5 per cent. per annum from 17th January 1907 up to this date. On this additional amount being paid in within one month of the date of this order being certified to the Court below, the decree of the learned District Judge will stand discharged and that of the Court of first instance restored. But if the sum be not paid within the time allowed, this application will stand dismissed. We make no order as to costs.

(1) (1907) I. L. R., 30 Mad., 507.