

therefore we do not see our way to reverse it. According to that custom a tenant occupying a house in the *abadi* of the village is entitled to sell the materials of his house and also the right to occupy the site of the house so long as the house is standing. We therefore declare that the sale-deed of the 12th of January, 1900, is valid and binding so far as it purports to transfer to the vendee the materials of the house in question and the right of residence in that house so long as it stands. Beyond this the transferee has acquired no interest in the property. The appellants have substantially failed and must bear the costs of this appeal as also the costs in the courts below.

Objections have been filed, but are not pressed. We dismiss them, but without costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

GHAFUR-UD-DIN (PLAINTIFF) v. HAMID HUSAIN AND OTHERS

(DEPENDANTS).*

Civil Procedure Code (1882), sections 244, 283—Property attached in execution of decree purchased while under attachment—Decree set aside—Purchaser not the representative of the judgment-debtor.

Where a decree is set aside in appeal everything done in pursuance of that decree comes to an end. Hence where property which was subject to an attachment was purchased, but the decree under which the attachment was levied was set aside, it was held that the purchaser was not the representative of the judgment-debtor within the meaning of section 244 of the Code of Civil Procedure, 1882.

THE facts of this case are as follows:—

The plaintiff, Ghafur-ud-din, brought a suit against one Fakhr-ud-din on the 15th of March, 1897, to recover a dower debt due to his sister Musammat Shakur-un-nissa, who had died in 1904. His suit was decreed *ex parte* on the 19th of January, 1898. After the decree Ghafur-ud-din applied for execution and got certain properties of Fakhr-ud-din attached on the 17th of February, 1898. The judgment-debtor appealed against the *ex parte* decree, and it was subsequently set aside by the High Court in March 1898. The High Court remanded the case to the

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* First Appeal No. 28 of 1908 from a decree of Girraj Kishor Datt, Subordinate Judge of Bareilly; dated the 26th of November, 1907.

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lower court for trial on merits. The suit was tried and was finally decreed in favour of the plaintiff in 1904. The decree-holder thereafter made an application on the 19th August, 1905, for sale of the properties attached in 1898. One Hamid Husain filed an objection under section 278 of the Code of Civil Procedure, 1882, to the effect that he had purchased the properties attached from Fakhr-ud-din and his sister in 1898 and 1905, respectively. His objection was allowed on the ground of possession. The decree-holder therefore brought the present suit for a declaration that Hamid Husain had no interest in the property. The defence, among other things, was that the suit was barred by section 244, Civil Procedure Code, 1882. The Subordinate Judge, holding that that section did apply, dismissed the suit. The plaintiff appealed to the High Court.

Mr. *M. L. Agarwala* (for Mr. *B. E. O'Connor*) and *Maulvi Ghulam Mujtaba*, for the appellant :—Section 244 of the Civil Procedure Code, 1882, did not bar the suit. The attachment made in 1898 ceased to exist after the decree of the 19th February, 1898, under which that attachment had been made, was set aside by the High Court. The purchase of Hamid Husain was not at all affected by that attachment. He did not become the representative of the judgment-debtor within the meaning of section 244, Civil Procedure Code, because the attachment during the subsistence of which he purchased the property was invalid and had no binding effect upon the parties.

Mr. *W. Wallach*, with him *Babu Lalit Mohan Banerji*, for the respondents, replied.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit brought under section 283 of Act No. XIV of 1882 under the following circumstances. One Fakhr-ud-din had two wives, namely, Musammat Latif-un-nissa and Musammat Shakur-un-nissa. The latter died in 1894, and on her death Ghafur-ud-din, plaintiff appellant, her brother, brought a suit claiming one-half of the amount alleged to be her dower. He got an *ex parte* decree against Fakhr-ud-din on the 19th of January, 1898, and in execution of that decree caused certain property to be attached in February, 1898. Fakhr-ud-din appealed against the decree to this Court and thereupon the case relating to the execution of the

decree was struck off the files on the 24th of December, 1898. This Court set aside the *ex parte* decree on the 26th of November, 1900, and remanded the case to the court below for fresh trial. The lower court re-heard the case and made a decree for Rs. 75, but upon appeal to this Court that decree was varied and a decree was made on the 27th of April, 1904, for the full amount claimed by the plaintiff. Meanwhile Fakhr-ud-din died and his second wife Latif-un-nissa and his sister Nasir-un-nissa were brought upon the record as his legal representatives. After the passing of the final decree of this Court, application was made for execution of that decree and certain property was attached in 1905. The defendant Hamid Husain filed an objection and prayed for the release of the property from attachment on the allegation that under a sale made in his favour on the 9th of August, 1898, he was the owner of the property and it was not liable to sale. This objection having been allowed, the suit out of which this appeal has arisen was brought by the plaintiff for a declaration that the property was liable to be sold in execution of his decree. The Court below has dismissed the suit on the ground that Hamid Husain must be deemed to be a representative of the judgment-debtor within the meaning of section 244 of Act No. XIV of 1882 and that the suit was therefore not maintainable. It is contended on behalf of the appellant that as the decree made by the Court of first instance on the 19th of January, 1898, was set aside by this Court, everything which took place in execution of that decree came to an end, and that therefore by reason of his having purchased the property during the pendency of an attachment in execution of the decree which was set aside, the defendant cannot be deemed to be the representative of the judgment-debtor within the meaning of section 244. This contention is in our judgment well founded. Indeed the learned counsel for the respondent has not disputed its correctness. As the decree in execution of which the property was attached in 1898 was set aside by this Court on the 26th of November, 1900, everything that was done in pursuance of that decree came to an end, and therefore the defendant cannot be said to be the purchaser of the property pending a subsisting attachment. The matter could not form the subject of an adjudication under section 244 of the Code

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of Civil Procedure, 1882, and this suit was maintainable against the defendant. We accordingly allow the appeal, and, as the suit was dismissed upon a preliminary ground and the decision of the Court below on that ground is erroneous, we remand the case to that Court under order 41, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and to dispose of it on the merits. Costs here and hitherto will follow the event.

Appeal allowed and cause remanded.

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November 11.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

GANGA SARAN SINGH AND OTHERS v. BHAGWAT PRASAD.*

Criminal Procedure Code, sections 145, 439—Defect in form of written order—Jurisdiction—Revision.

Where in proceedings under Chapter XII of the Code of Criminal Procedure the initial order was defective in that it did not set forth the grounds for the Magistrate being satisfied of the existence of a dispute likely to cause a breach of the peace: but on the other hand both parties were fully cognizant of the matter in dispute and there was in fact danger of a breach of the peace, the High Court declined in revision to interfere with the Magistrate's order.

THIS was an application for revision of an order purporting to have been passed under section 145 of the Code of Criminal Procedure by a Magistrate of the first class. The facts of the case appear from the following judgment of Tudball, J., before whom the case was first argued.

"This application for revision arises out of proceedings purporting to have been taken by a Magistrate under section 145, Criminal Procedure Code, in respect to certain lands. The sole point urged is that the Magistrate did not record an order in writing under section 145 of the Code, stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the plots in question.

"The history of the case is briefly as follows:—The land in dispute was a fixed rate tenure partly cultivated by sub-tenants. On 30th March, 1905, Chattardhari Singh and Bhagwat Prasad Singh obtained a decree against the applicants Ganga Saran Singh, etc. In execution thereof this land was put to sale and purchased by the decree-holders on 25th March, 1908, and on 12th July, 1908, the Amin put them into actual possession of the lands not in the hands of sub-tenants and into symbolical possession of such as was held by such sub-tenants.

* Criminal Revision No. 338 of 1909, against the order of W. T. M. Wright, Magistrate, first class, of Mirzapur, dated the 26th of April 1909.