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We are, therefore, unable to hold it to be proved or to find that the fact has been legally held to be proved that there was any breaking, nor is it possible to hold by any permissible interpretation that the word "breaking" includes mere "clearing." The distinction between the two words is obviously recognized in the Act. It is possible and even probable that the Government intended by the notification to forbid mere "clearing" also, but in view of the distinction made between "breaking" and "clearing" in the Act, it is not possible for us to hold that where "breaking" only is forbidden by the notification, an offence has been committed where there has been only "clearing."

We understand that it is not desired on behalf of the Crown that the case should be sent back for further evidence and a fresh decision thereon. The application must, therefore, be allowed. It is allowed accordingly and the conviction and the sentence of fine are set aside. If the fine has been paid, it will be refunded.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Boys and Mr. Justice Kendall.

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SHIAM LAL (PLAINTIFF) v. GIRRAJ KISHORE AND
OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXI, rule 73—Execution of decree—Sale—Persons barred from purchasing—Clerk to decree-holder's pleader.

A clerk of a pleader of a decree-holder is not debarred by the terms of order XXI, rule 73 of the Code of Civil Procedure

* Second Appeal No. 858 of 1924, from a decree of Kashi Prasad, Additional Subordinate Judge of Aligarh, dated the 18th of February, 1924, confirming a decree of Muhammad Ahmad Ansari, Munsif of Haveli, dated the 29th of November, 1922.

from purchasing property sold in execution of the decree. *Alagirisami v. Ramanathan* (1), referred to.

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Rule 73 is intended to prohibit all those who have anything to do with the machinery of the sale having any interest, direct or indirect, in the result of the sale.

THE facts of this case are fully stated in the judgement of the Court.

Pandit *Shiam Krishna Dar* and *Munshi Benod Bihari Lal*, for the appellant.

Munshi Hazari Lal Kapoor, for the respondents.

BOYS and KENDALL, JJ. :—Shib Singh and his brother got a decree (No. 202 of 1912) for costs for Rs. 56 against Fateh Singh. This same Fateh Singh had a revenue court decree (No. 28 of 1916) for Rs. 189-11-9 against Shib Singh and his brother. Shib Singh proceeded to execute the decree and attached the decree No. 28 of 1916 of Fateh Singh. It was put up for auction, and one question that has been argued before us in this case is whether that was, in view of the terms of order XXI, rule 53, a proper procedure. At the sale the property was purchased by Shiam Lal, the present appellant here, for the sum of Rs. 50. Shiam Lal was the clerk of a pleader of Shib Singh. No objection was made by either Shib Singh or by Fateh Singh to this purchase by Shiam Lal, that is to say, neither of them raised an objection that under the terms of order XXI, rule 73, Shiam Lal, as clerk of the decree-holder's pleader, was prohibited from purchasing. This is another question with which we are concerned. Subsequently Shib Singh actually withdrew the Rs. 50. Next come the proceedings which are alleged by the present appellant to have been, and which indeed appear to have been, fraudulent. Fateh Singh, notwithstanding the

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fact that his decree (No. 28 of 1916) had been sold, proceeded to execute it against Shib Singh. What exactly then followed has not been made very clear; but it is clear enough for the purposes of the present appeal that Shib Singh objected, and in the event Fateh Singh and Shib Singh compromised the matter on certain terms, with which we are not concerned. Some time afterwards was instituted the present suit. Shiam Lal did not proceed to execute the decree against Fateh Singh, which he had purchased, but sued Fateh Singh and Shib Singh for recovery of the whole of the amount of that decree as on the date of the compromise. This sum he claimed from Fateh Singh alone, but in the alternative he claimed Rs. 50 from Shib Singh and the balance from Fateh Singh. Shib Singh made no defence. Fateh Singh set up the defence that the purchase by Shiam Lal was a nullity, relying upon order XXI, rule 73, and urging that a pleader's clerk could not buy at the auction sale. This defence found favour with the trial court. On appeal the lower appellate court not only agreed in this view but went on to hold that in view of the terms of order XXI, rule 53, a decree that has been attached could not be sold and the procedure provided by order XXI, rule 53, must be followed. Shiam Lal appeals to this Court, urging that the view of the lower appellate court on both points was wrong.

The case first of all came before our brother Mr. Justice MUKERJI, who referred it to a Division Bench in regard to the effect of order XXI, rule 73. He pointed out that the question is not covered by any authority and we fully agree with him that it is an important point in relation to the conduct of legal practitioners' clerks. He did not refer the question of the effect of order XXI, rule 53, no doubt because

he had already expressed his views in 85 Indian Cases, page 660, but at the same time he referred the whole case and we have to deal with it.

To consider first the effect of order XXI, rule 73, we are unable to hold that in the ordinary meaning of the language a clerk of a pleader is a person who has "duties to perform in connexion with the sale." First of all, reading the words "or other person" in connexion with the words "no officer" it appears to us that rule 73 is intended to prohibit all those who have anything to do with the machinery of the sale having any interest in the result of the sale. That interest must not be direct or indirect, but we cannot find in this case that there is any suggestion beyond that Shiam Lal was his clerk, that the pleader had an interest in the purchase. We are not, therefore, concerned with the fact that in one aspect the pleader himself may be regarded as an officer of the court, though we may note that it has been held in *Alagiri-sami v. Ramanathan* (1), that the corresponding section then in force did not prevent a pleader from purchasing. We are, however, only concerned with the position of a pleader's clerk and we are unable to hold that he was debarred from purchasing by the terms of order XXI, rule 73.

We turn now to the second point, whether in view of order XXI, rule 53, the sale was a nullity. At the outset, we may say that this question does not really, in the peculiar circumstances of the case, call for determination. As regards Shib Singh, the clear facts are that the sale took place at his own instance and but for his action never would have taken place, and, further, he himself reaped the benefits of that sale in that he became entitled to, and did actually

(1) (1886) I.L.R., 10 Mad., 111.

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withdraw, the Rs. 50 purchase money paid by Shiam Lal. As to Fateh Singh, he also must be presumed to have had due notice of the sale. The counsel for Fateh Singh's representative in interest here admits that no objection has been taken hitherto that Fateh Singh had no notice of that sale. Nor is he even in a position to substantiate such an assertion here. Neither at the sale nor subsequently has Fateh Singh made any attempt to object to the purchase by Shiam Lal. It appears to us clear then beyond doubt that neither Shib Singh nor Fateh Singh can be allowed to object to the sale in the present case.

We think, however, as the point has been argued before us, that it is desirable to express shortly our views as to the effect of order XXI, rule 53. In the case decided by Mr. Justice SULAIMAN and Mr. Justice MUKERJI, reported in 85 Indian Cases, page 660, reliance was placed on the terms of section 60 of the Code of Civil Procedure, and it was noted that the schedule, of which order XXI, rule 53, constitutes a part, only deals with procedure. Of course, in one sense section 60 also only deals with procedure; but there is a clear distinction between the sections of the Act and the schedule, which can be altered or added to at any time by the various High Courts. If it were, therefore, necessary to decide the point, we would not be prepared to differ from the view expressed in that case.

The result is that allowing the appeal, we set aside the decree of the courts below, and decree the plaintiff's claim for recovery of the whole amount as due under the decree No. 28 of 1916 from Fateh Singh alone. The appellant will have his costs throughout.

Appeal allowed.