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thoroughfares or for other matters mentioned in section 144 of the Code of Criminal Procedure or under other statutory provisions or for regulation of traffic, provided that the exercise of such right does not amount to a nuisance recognized by law.”

We accordingly modify the decree of the court below by substituting therefor a decree in the above form. The parties are to bear their own costs.

Before Mr. Justice Mukerji and Mr. Justice Bennet.

ANAND KRISHNA (JUDGMENT-DEBTOR) v. KISHAN DEVI (DECREE-HOLDER) AND RAJ BAHADUR AND ANOTHER (JUDGMENT-DEBTORS).*

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Execution of decree—Defect in judgment-debtor's title in property attached and sold—Third party having title ousting decree-holder purchaser from half the property—Remedy of purchaser—Claim to recover half the price paid—Joint decree—Any judgment-debtor can challenge right to execution though the relief is not claimed against him.

A decree-holder attached a certain property as being the property of the judgment-debtors; the judgment-debtors never asserted that they had title to the whole of it. The property was sold by auction and purchased by the decree-holder, and the sale was confirmed. Afterwards, on a suit by a third party who established his title to a half share in the property, the decree-holder purchaser lost this half share. He then applied in execution, seeking to recover one half of the price which he had paid for the property. *Held*, there was no principle of law or equity under which he would be entitled to recover. *Held*, also, that the decree being a joint decree against several judgment-debtors, any of them was entitled to object to the decree-holder's claim to recover half the price, although that claim was sought to be enforced by attachment and sale of an item of property belonging to another of the judgment-debtors.

Messrs. *Bhagwati Shankar, S. N. Seth and H. C. Mukerji*, for the appellant.

*First Appeal No. 456 of 1929, from a decree of Shankar Lal, Subordinate Judge of Bulandshahr, dated the 20th of July, 1929.

Messrs. *Hazari Lal Kapoor* and *M. A. Aziz*, for the respondents.

MUKERJI and BENNET, JJ. :—This appeal raises a point of law for which no authority either way has been produced before us. The point has to be decided on general principles.

It appears that the respondent *Mst. Kishan Devi* held a decree for money for a large amount against four persons, the appellant *Anand Krishna* and his brothers *Raj Bahadur Krishna*, *Shiam Krishna* and their mother *Mst. Kamla Devi*. At one stage of the execution a certain house was attached as the property of the judgment-debtors and was sold on the 24th of August, 1922. It was purchased by the decree-holder *Mst. Kishan Devi*, and the sale was in due course confirmed. The sale was, however, contested by a suit by one *Jagmohan Swarup*, who claimed to have purchased a half share in the property, being the share belonging to the judgment-debtors' ancestor's brother *Badri Krishna*. The suit succeeded with the result that *Mst. Kishan Devi* lost a half share in the property purchased by her.

By the application for execution out of which this appeal has arisen *Mst. Kishan Devi* seeks to recover a sum of Rs. 3,000, being one-half of the auction sale price paid by her. The judgment-debtor *Anand Krishna* objected to the execution but was unsuccessful. Hence this appeal.

A preliminary point has been taken on behalf of the respondents, namely the appeal is not maintainable at the instance of *Anand Krishna*, inasmuch as the property that has been sought to be attached is the property not of *Anand Krishna* but of his brother *Raj Bahadur Krishna*. We do not think that this preliminary objection has any force. The execution application itself shows that the decree-holder sought execution against all the judgment-debtors and not against *Raj Bahadur*

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Krishna alone. If the application be successful and if the property attached do not fetch the full amount for which execution has been taken out, there will be nothing to prevent the decree-holder from seeking execution against the present appellant. The present appellant would then be met with the plea that he ought to have preferred an objection to the execution and the execution order operates as *res judicata*. The decree is a joint one, and we think any one of the judgment-debtors may object to the execution, although for the time being his personal property has not been attached.

On the merits we think the appeal ought to succeed. When the decree-holder sought the attachment of the house, the judgment-debtors never asserted that they had title to the whole of it. Further, the judgment-debtors never demanded any particular price for the property. The decree-holder alone chose the property to be sold, and she alone chose what price she would pay for it. Such being the case, there does not seem to be any equity in favour of the decree-holder by which it may be said that she is entitled to recover one-half of the price paid by her, because she lost one-half of the property attached and sold. Suppose that the property was really worth Rs. 20,000, and the decree-holder obtained it at the auction sale for Rs. 6,000. The property left with her, after the success of the claim of Jagmohan Swarup, would still be worth more than Rs. 6,000 paid by the decree-holder. The illustration given would show that there is no principle of law under which the decree-holder auction purchaser can turn back and ask for a refund as it were of the price paid by her.

The learned Subordinate Judge relied on the case of *Radha Kishun Lal v. Kashi Lal* (1). That case is clearly distinguishable on the ground that there the title of the judgment-debtor to the lot No. 1 was found to be entirely absent. There was no consideration whatsoever for the

(1) (1923) I.L.R., 2 Pat., 829.

purchase. In the circumstances, rule 91 of order XXI of the Code of Civil Procedure would have applied and would have permitted the auction purchaser to ask for a refund of the purchase money after the setting aside of the sale. In the Patna case there was no discussion as to the maintainability or otherwise of the application. It was assumed that the application was maintainable and the only point that was decided was one of limitation. The Patna case is therefore no authority whatsoever for the point we have to decide. Further, as we have shown, the facts of the case show that there is no conflict between the case before us and the Patna decision. We may point out that the Patna case was not accepted as laying down good law by two learned Judges of the Madras High Court in the case of *Muthukumaraswami Pillai v. Muthuswami Thevan* (1). In the Madras case it was held that the decree-holder, if he thought that he should avoid the sale altogether, should have made an application within thirty days of the sale under article 166 of the Limitation Act, and his failure to do so prevented him from maintaining a subsequent application for execution of the decree. This, however, was a question of limitation and limitation alone.

On general principles, we are of opinion that the decree-holder purchaser is not entitled to ask the judgment-debtors to pay one-half of the price which she herself chose to pay. In the result, we allow the appeal, set aside the order of the court below and dismiss the execution application of the decree-holder with costs to the appellant throughout.

(1) (1926) I.L.R., 50 Mad., 639.