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in which he prayed that the objections of the judgment-debtors might be disallowed and the sale be confirmed. The application was eventually disallowed. On the 10th February 1882, the decree-holder again applied for execution of the decree. The lower Courts held that the application was barred by limitation, as the last application, within the meaning of No. 179 (4), sch. ii of Act XV of 1877, had been made on the 10th August 1878, since when more than three years had elapsed.

In second appeal the decree-holder contended that limitation should be computed from his application of the 15th March 1879, and therefore the present application for execution was within time.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the appellant.

Shah *Asad Ali* for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment :—

OLDFIELD, J.—We are of opinion that the decree-holder's application of the 15th March 1879 sufficed to avoid the bar of limitation. The orders of the Courts below are set aside, and the case remanded to the first Court for disposal on the merits.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

MUNNA SINGH AND OTHERS (PLAINTIFFS) *v.* GAJADHAR SINGH (DEFENDANT).*

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Sale in execution of decree—Sale set aside—Return of purchase-money—by purchaser for purchase-money—Civil Procedure Code, ss. 313, 316.

Per STRAIGHT, OLDFIELD, and TYRRELL, JJ.—That the words in s. 315 of the Civil Procedure Code "no saleable interest" mean "nothing to sell," and are not intended to confine the cases in which a purchaser at an execution-sale shall be entitled to receive back his purchase-money to those in which the judgment-debtor, though having an interest, such interest is, by prohibition of law or for some other reason, unsaleable.

Held by the Full Bench that a purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-

*Second Appeal No. 1349 of 1881 from a decree of Babu Kashi Nath Biswas, Additional Subordinate Judge of Cawnpore, dated the 20th August 1881, reversing a decree of Shah Ahmad-ullah, Munsif of Fatehpur, dated the 20th June 1881.

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money when it is found that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in s. 315.

THIS was a reference to the Full Bench by Straight and Brodhurst, JJ. The facts of the case and the point of law referred are fully set out in the order of reference, which was as follows:—

STRAIGHT, J.—This is an appeal from a decision of the Additional Subordinate Judge of Cawnpore, dated the 20th August 1881. The material facts for consideration are as follows:—Gajadhar Singh, the defendant-respondent, had a money-decree against one Dhan Singh, and in execution of it, he, on the 21st February 1879, brought to sale a zamindari share of his judgment-debtor in mauza Nasauli Buzurg. This was purchased by Ahsan-ul-zaman and Imdad Husain for Rs. 105. Dhan Singh subsequently objected to the sale on the ground that the property was ancestral, and for some reason best known to himself, the Munsif, on the 4th March 1879, set it aside and directed a fresh sale for the 20th June following. Meanwhile Ahsan-ul-zaman and Imdad Husain instituted a suit against Gajadhar Singh and Dhan Singh for establishment of the sale of the 21st February 1879. The Munsif on the 28th May 1879, holding that such a suit would not lie, dismissed it, but on the 19th November following, on appeal to the Subordinate Judge, this decision was reversed and the plaintiff's claim was decreed. In the interim, the sale ordered for the 20th June had taken place, and the plaintiffs-appellants had become the purchasers of the before-mentioned property for Rs. 425. After the decision on appeal of the suit of Ahsan-ul-zaman and Imdad Husain, the plaintiffs-appellants were dispossessed of the share so purchased by them, and in consequence hey now sue Gajadhar Singh to recover the Rs. 425 paid by them n account of it. The Munsif decreed the claim, but the Additional Subordinate Judge on appeal dismissed the suit upon two grounds; first, that having regards to the provisions of s. 315 of the Procedure Code no suit can be maintained, and that the plaintiffs-appellants should have sought their remedy in the execution department, and next, that upon the principle of "*caveat emptor*" the plaint disclosed no cause of action.

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From this decision the plaintiffs appeal to this Court, and their pleas in appeal specifically assail the soundness of these two rulings of the Subordinate Judge.

The substantial point really seems to be, whether the language of s. 315 of the Procedure Code does forbid a suit like the present, and perhaps in order to more satisfactorily consider this question, it may be convenient to see what the law with regard to it was under Act VIII of 1859, and what alterations have been introduced by the present Code. S. 258 of Act VIII of 1859 provided that "whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, with or without interest, in such manner as it may appear proper to the Court to direct in each instance." In reference to this section many rulings may be found, but I think it sufficient to mention *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar* (1); *Dorab Ally Khan* v. *Khajah Moheeooddeen* (2); *Framji Besanji Dastur* v. *Hormasji Pestanji Framji* (3); *Hira Lal* v. *Karimun-nisa* (4); *Ram Narain Singh* v. *Mahtab Bibi* (5); and an unreported Full Bench decision of this Court in Appeal No. 7 under s. 10 of the Letters Patent, dated 21st April last. By all these decisions it seems to have been recognised as an established principle of law, that a purchaser at a sale in execution of decree cannot recover his purchase-money, if it turns out that the judgment-debtor whose immoveable property he has purchased had no saleable interest, and that s. 258 of Act VIII of 1859 solely applies to those cases in which a sale has been set aside for irregularity in publishing and conducting it. The only contrary view of which I am aware is enunciated by Couch, C.J., in *Bank of Hindustan* v. *Prem Chand Raichand* (6). It would therefore seem to come to this, that under the old law an auction-purchaser could get back his purchase-money if the sale were set aside for material irregularity in publishing or conducting it, but that it was not a sufficient ground to avoid it, that the judgment-debtor had no saleable interest. The auction-purchaser bought at his peril, for there was no warranty, express or implied, and if he acquired nothing, that was his misfortune. Ss. 313 and 315 of

(1) 4 B. L. R., F. B., 11.
(2) I. L. R., 1 Calc., 55.
(3) I. L. R., 2 Bom., 258.
(4) I. L. R., 2 All., 780.
(5) I. L. R., 2 All., 828.
(6) 5 Bom. H. C. Rep., 83.

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the new Code, however, have introduced an entirely new state of things, and in them are to be found special provisions for the benefit of auction-purchasers of immoveable property at sales in execution of decree, where the judgment-debtor turns out to have no saleable interest. By s. 313 such purchaser may now apply to have such sale set aside, "on the ground that the person whose property purported to be sold had no saleable interest," and "the Court may make such order as it thinks fit." For this application the Limitation Law of 1877, art. 172, allows a period of sixty days from the date of sale, and not thirty as allotted to ordinary applications to set aside a sale under ss. 311 and 312. Moreover, s. 588 of the Code, cl. (16), makes orders under s. 313 setting aside or refusing to set aside a sale appealable. But beyond these provisions of s. 313, a still greater change is to be met with in s. 315, for there we find that, if a sale has been set aside under s. 313 or it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the "purchaser" has for that reason "been deprived of it, he shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid." It is to be observed that an unusual course has been adopted in this latter paragraph of introducing into a Code regulating procedure a novel and somewhat startling declaration of substantive law. Now no doubt according to the Contract Law of this country a purchaser by private sale can hold the seller responsible for any loss he may sustain, if through the invalidity of the latter's title to sell the former is deprived of his purchase. It may be that the framers of the Code of 1877 had this present to their minds, when they introduced the innovation in s. 315, and contemplated placing purchasers by public and private sales upon the same footing, though it is to be noticed that while in the case of private sales the buyer is to be recouped for any loss he has sustained, that is to say, his *solatium* is to be in the shape of damages, in the case of a public sale of a immoveable property the auction-purchaser "*shall be entitled*" to "*receive back his purchase-money.*" "Shall be entitled," but how? The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a

decree for money." Now it seems to me that, looking at these provisions, more particularly to the paragraph just set out, while it was intended by ss. 313 and 315 to introduce a new principle of law in the interest of auction-purchasers, it was meant to limit its application and enforcement to a particular form of procedure, namely, by proceedings in the execution department. In my opinion, where sections of an Act, as in the present instance, declare a new and specific right to be a legal right and enforceable, and at the same time contain provisions as to the procedure by which such right may be enforced, this is the procedure that must be adopted and no other. Now it is to be remarked that while the "decree-holder" or "the person whose immoveable property has been sold" must, if they seek to set aside a sale, apply within thirty days from its taking place, the auction-purchaser has sixty days, or just double the time, in which to prefer his application under s. 313, this longer period being allotted as a reasonable one for him within which on the one hand to obtain confirmation of sale and possession, or on the other hand to find out that his purchase has been infructuous and so to apply for repayment of his purchase-money. If he applies to the Court that brought the property to sale to have it set aside, on the ground that the judgment-debtor had no saleable interest, both the judgment-debtor and the decree-holder are to have an opportunity of being heard against such application, and if it is granted, the Court shall declare the auction-purchaser entitled to receive back his purchase-money with interest or without, as it may decide, and such order enforced at once in execution in the same manner as a decree for m Why, when a simple and plain-sailing procedure of this kind i down, it is to be said that the same section which directs i gives a right to bring a regular suit I cannot myself unders If the sale is set aside under s. 313 and the order, if appe is confirmed, the auction-purchaser is "*de facto*" entitled to fund of his purchase-money. Why then is he to be allow adopt the dilatory and expensive alternative of a regula against the decree-holder, who has probably already entere satisfaction of his decree, and to subject him to a delay, that r result in his ultimately finding himself barred by time from ing a fresh application for execution against his judgment-de

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In my opinion, therefore, ss. 313 and 315, more particularly the latter, do bar a regular suit, and the remedy of the auction-purchaser lies in the execution department. As, however, the point is one of considerable importance, and no decision, as far as I am aware, has yet been passed upon it, I would, if my brother Brodhurst consents, refer the following question to the Full Bench for its opinion:—

Having regard to the language of ss. 313 and 315 of the Procedure Code, can an auction-purchaser at a sale in execution of decree maintain a suit against the decree-holder for recovery of his purchase-money, when it turns out that the judgment-debtor had no saleable interest in the property sold, or is he limited to the special procedure in the execution department therein provided.

BRODHURST, J., concurred in the reference.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad* for the appellants.

Munshi *Sukh Ram* and Maulvi *Mehndi Hasan* for the respondent.

The following opinions were delivered by the Full Bench:—

STUART, C.J.—We are asked by this reference whether, having regard to the language of ss. 313 and 315 of the Procedure Code, an auction-purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-money, when it turns out that the judgment-debtor had no saleable interest in the property sold, or whether he is limited to the special procedure in the execution department therein provided, and the answer is in the affirmative. The case appears to me under the third condition of things mentioned in s. 315, viz., when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid"; and then the section goes on to provide that "repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money." This procedure, it will be observed, is

permissive and discretionary. It does not bar a suit, if that be considered, under the circumstances of the case, the more appropriate and convenient remedy, for to proceed by way of suit is in all cases a plaintiff's right, unless the suit is excluded expressly or by necessary implication. Here there is no exclusion of a suit, either express or implied, but an alternative proceeding of a summary nature is allowed by which a disappointed purchaser may, if he thinks fit, recover his money. The words "when it is found" in this s. 315 deserve attention: in my opinion they contemplate some previous proceeding, in which it had been found that the judgment-debtor had no saleable interest in the property purported to be sold, or the words may mean "when it has been ascertained or has become known," in which case the purchaser might apply to the Court for repayment by means of the procedure provided by the section, but not to the exclusion, in the alternative, of a suit. It follows therefore that both remedies, that is either one or the other, are open to a purchaser seeking to get back his purchase-money on the ground of the judgment-debtor having no saleable interest; that is, unless something has been done, some step taken by way of suit or application, either the one or the other of these remedies is, in the discretion of the party interested in getting a sale set aside, by reason of the judgment-debtor having no saleable interest, available to the purchaser. On the other hand, where a party has elected and put in motion his procedure, whether by suit or application, that is for the occasion his only remedy. A suit is, as I have said, a plaintiff's right, when no other remedy is provided; but if the object is to set aside a sale of land he may, in his discretion, proceed summarily under s. 315, or he may proceed by way of suit.

In the case which has given rise to this reference there was no application of the kind contemplated by s. 313, and there cannot be a doubt therefore that the suit which was actually brought was the proper remedy.

STRAIGHT, J.—I went very fully into the facts of the case, and the questions involved in it, upon which this reference has arisen, in my order of the 7th June last, and it would serve no useful purpose to recapitulate the same matters here. All the points

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involved have now been exhaustively argued and examined at the hearing before the Full Bench, and it only remains to express an opinion upon them. By way of preliminary I may remark that at the outset of the discussion of this reference a question was raised by my brother Oldfield, as to whether the expression "no saleable interest" in ss. 313 and 315 of the Civil Procedure Code was intended to cover cases in which sales were set aside, on the ground that the judgment-debtor had no saleable interest at all, or whether it was meant to be confined to those instances where, though having some interest, it was, either by prohibition of law or for some other reason, unsaleable. I confess I do not feel myself pressed to adopt the latter conclusion, nor am I disposed to place any such limitation upon the words. For it should not be lost sight of, that whereas by s. 249, Act VIII of 1859, all that had to be proclaimed for sale was "the right, title and interest of the judgment-debtor," now by the present Code it is "the property and any incumbrance to which the property is liable" that must be advertised. Hence, in harmony with this latter provision, it would seem that ss. 313 and 315 provide for cases in which by reason of property having been put up and sold, either as free from incumbrance, or without disclosure of all incumbrances, the purchaser does not acquire the interest that purported to be sold him. It is further to be observed that now under s. 287 of the present Code, the duty and obligation is cast upon the Court executing a decree of ascertaining the several matters to be specified in the sale notification by the examination of any person it thinks necessary, or of any document in the possession or power of such person relating to the property to be sold. It is obvious, therefore, that if an incumbrance or incumbrances, which are not disclosed, do exist, the auction-purchaser must, in the sense of s. 315, be thereby deprived of what he has purchased, and what purported to be sold him—namely, the property free of incumbrances, just as much as if it turned out that it belonged to somebody else, and that the judgment-debtor had no interest in it at all. I fail to understand why any distinction of the kind suggested by my brother Oldfield at the hearing, but which, having had the advantage of seeing his answer to this reference, I find he does not now maintain, should be drawn in favour of an auction-purchaser who buys when the

judgment-debtor has an interest that is not saleable, as against an auction-purchaser who buys when the judgment-debtor has no interest at all. As bearing upon the view I take, that the words "no saleable interest" should not be limited in the manner suggested, I may refer to a case decided by Pontifex, J.—*Naharmul* v. *Sadut Ali* (1). Under all the circumstances, therefore, I think the expression should be interpreted in the widest and most general sense, and as meaning in plain terms "nothing to sell." For I cannot suppose it was ever intended that a purchaser at an auction-sale held under the authority of a Court, who buys a property as free from incumbrance, which subsequently turns out to be mortgaged up to its full value, can be said to have purchased what purported to be sold him, because it may be argued that he technically acquired the judgment-debtor's equity of redemption.

So much for this preliminary point; and now to turn to the substantial question raised by the reference—namely whether, when a sale is set aside on the ground that the judgment-debtor had no saleable interest, or such is afterwards found to be the case, the auction-purchaser is absolutely bound to resort to the Court which ordered the sale to enforce a payment of his purchase-money, or whether he has the alternative of a regular suit open to him? In other words, are the provisions of s. 315 exhaustive, and do they prohibit such a suit? In my referring order I stated all the reasons that occurred to me why this question should be answered in the affirmative, and it is unnecessary to repeat them. At the hearing before the Full Bench it was much pressed upon us, that as the expression used in s. 315 is "may be enforced," and a suit is not in terms forbidden, no bar exists to a proceeding of that character.

There is weight in this contention, as also in the argument, that questions of difficulty as to the repayment of purchase-money might arise between auction-purchasers and decree-holders, which it would be most unsatisfactory and inconvenient to have determined in the execution-department. As the law now declares that if a purchaser at a Court-sale is deprived of his purchase, because there was nothing belonging to the judgment-debtor to

(1) 8 Calc. L. R., 468.

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sell him, he is entitled to receive back his purchase-money, it would perhaps be unreasonable to limit his remedy to that provided in s. 315. For it must not to be lost sight of that it is not only when a sale has been set aside under ss. 312 and 313, but further "when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it," that an auction-purchaser is declared by s. 315 entitled to receive back his purchase-money, and this provision was no doubt intended to cover a case in which, though the sale had not been set aside in the execution department, some third person had, by separate suit or in some other manner, established his title to the property sold as belonging to the judgment-debtor and so ousted the auction-purchaser. In a case of that kind it would seem scarcely convenient or appropriate to limit the latter to the machinery of the execution department to obtain a refund of his money, for questions of difficulty and complexity might arise in reference thereto, that could only be determined in a suit to which the decree-holder, the judgment-debtor, and the person at whose instance the auction-purchaser had been deprived of his purchase were made parties. Having given the matter the best consideration I can, and in the absence of any positive prohibition to such a suit, I would therefore answer the question put in the reference by saying, that an auction-purchaser at a sale in execution of decree can maintain a suit against a decree-holder for recovery of his purchase-money, when it turns out that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in s. 315.

TYRRELL, J., concurred in this opinion.

OLDFIELD, J.—I have had considerable doubt as to the meaning to be placed on the words "no saleable interest" in ss. 313 and 315 of the Civil Procedure Code, whether they refer to a case where the auction-purchaser is deprived of the property purchased because the judgment-debtor has no interest in it, or only to a case where the interest of the judgment-debtor is by law not liable to be sold, and the sale is for that reason set aside, or the auction-purchaser is deprived of the property.

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By s. 258, Act VIII of 1859, whenever a sale of immoveable property was set aside, the auction-purchaser was entitled to receive back his purchase-money with or without interest, in such manner as it might appear proper to the Court to direct in each instance. This provision has been held to meet those cases where the sale was set aside for irregularities under s. 256, and the ground for the relief is, that it is inequitable that the decree-holder should retain the purchase-money when the sale is set aside, and there is a guarantee on his part that the sale shall not be set aside or the auction-purchaser be evicted by the judgment-debtor, but he did not guarantee that the judgment-debtor had any right or interest in the property sold, and his not having any interest in it was in consequence no ground for setting aside the sale, or allowing a refund of the purchase-money, so far as the right to that relief rested on any obligation arising out of a guarantee of interest by the decree-holder and apart from other considerations. The following cases may be referred to:—*Sowdamini Chowdrain* v. *Krishna Kishor Poddar* (1); *Ram Tuhul Singh* v. *Bisesswar Lall Sahoo* (2); and *Dorab Ally Khan* v. *The Executors of Khajah Mohecooddeen* (3).

The present Civil Procedure Code, by ss. 313 and 315, has, in addition to the relief allowed to an auction-purchaser by s. 258, Act VIII of 1859, empowered him to apply to have a sale set aside on the ground that the person whose property purported to be sold had no saleable interest therein, and to recover his purchase-money with or without interest when the sale has been set aside on that ground, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it.

I was at first inclined to consider that it was intended by the alteration in the sections to allow of the sale being set aside and refund of the purchase-money only in cases when the judgment-debtor's interest was not saleable, and on that ground the purchaser had been deprived of the property by the judgment-debtor, and not when he had been evicted by title paramount, as the decree-holder, though not guaranteeing the interest of his judgment-debtor in the property, certainly guaranteed that the property, being the property

(1) 4 B. L. R., F. B., 11. (2) L. R., 2 Ind. Ap., 131.
(3) I. L. R., 3 Calc., 806; S. C. 3 Suth. P. C. C., 519.

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of his judgment-debtor, is liable to be sold, and that the sale will not be set aside or the purchaser be evicted by the judgment-debtor.

But the term "no saleable interest" is wide enough to embrace cases when there is found to be no interest at all in the judgment-debtor in the property sold, and it appears to be equitable that the sale should be set aside and the purchase-money refunded, when there is a total failure of consideration, as there will be in such a case, and such may have been the intention of the Legislature in introducing the alterations in question.

In my opinion the auction-purchaser is not limited to his remedy to recover the purchase-money in the execution department, but is at liberty to bring a suit. There is nothing in s. 315 to show that the purchase-money can only be recovered by order of the Court executing the decree, and when a suit is not expressly barred, it must be held to be maintainable, with reference to the provisions of s. 11 of the Code.

BRODHURST, J.—Clauses 2, 3 and 4 of s. 315 are as follows:—"Or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid. The repayment of the said purchase-money and the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money."

Thus the purchaser "shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid," and "repayment may be enforced against such person under the rules provided by this Code for the execution of a decree for money."

It is, however, nowhere laid down in the Procedure Code that repayment of the purchase-money can be enforced only under the said rules, and for the Legislature to have added in s. 315, that a suit on the above account might also be brought, would have been to adopt not only an unusual course, but, moreover, an unnecessary

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one, for it had already, at almost the commencement of the Code, *i.e.* in s. 11, been expressly stated that "the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force." The suit out of which this reference has arisen can then be heard, as it is not barred either by the provisions of the Civil Procedure Code or of any other enactment.

There is, I consider, in this case, as in other instances mentioned at the hearing, a double remedy, and my answer therefore to the reference is that, under the circumstances stated, the auction-purchaser is not limited to the special procedure in the execution department, but is also competent to bring a suit for the recovery of the purchase-money.

APPELLATE CIVIL.

1883
May 8.

Before Mr. Justice Straight and Mr. Justice Oldfield.

HIMAYAT HUSAIN (JUDGMENT-DEBTOR) *v* JAI DEVI (DECREE-HOLDER).*

Execution of decree—The decree to be executed where there has been an appeal—Costs.

The defendant in a suit appealed from so much of the decree of the Court of first instance as related to the amount of costs payable by him to the plaintiff. The decree of the appellate Court directed "that the order of the lower Court be upheld, and the appeal be dismissed: the appellant to pay the costs." *Held* that the amount of costs awarded by the Court of first instance, although they were not specified in the appellate Court's decree, were recoverable in execution of that decree, inasmuch as those costs were the subject-matter of the appeal, and the appellate Court, in affirming the decision of the first Court on that point, made them the substantive portion of its decree.

Shohrat Singh v. *Bridgman* (1) distinguished.

JAI DEVI, the plaintiff in a suit, obtained a decree against the defendant, Himayat Husain, in the following terms:—"The whole claim of the plaintiff be decreed against the defendant with interest amounting to Rs. 33-10 at the rate claimed on the

* Second Appeal No. 15 of 1883 from an order of E. B. Thornhill, Esq., Judge of Aligarh, dated the 10th October 1882, affirming an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 9th October 1882.

(1) I. L. R., 4 All., 376.