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principal, interest as above determined, and costs, for the satisfaction of which the mortgaged properties (except lot 21) or such portion of them as it may be necessary to sell be sold. The sale proceeds will be appropriated in the first instance in satisfaction of the principal sum of Rs. 60,000 and of the costs, and the surplus (if any) in satisfaction of the interest. For any portion of the principal Rs. 60,000 which remains due after the sale of the mortgaged properties, there will be a decree against Rajpati Koeri, as representative of her deceased husband Jugal Pershad Singh, to be satisfied out of any properties of the latter which have come into her possession. For any portion of the interest which may remain due after the sale of the mortgaged properties, there will be a joint decree against Rajpati Koeri, as representative of her deceased husband to be satisfied in the manner above stated, and against Janki Singh.

The plaintiff will get his costs in this Court and in the lower Court, and the appeal of the defendant Mussumat Rajpati Koeri is dismissed with costs.

Before Mr. Justice Norris and Mr. Justice Beverley.

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 July 26.

GOPAL CHUNDER CHATTERJEE (DEFENDANT No. 2)
 v. GUNAMONI DASÍ (PLAINTIFF).*

Civil Procedure Code (Act XIV of 1882), s. 248—Notice of execution—Condition precedent—Execution of decrees against legal representative.

The issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of a decree against the legal representative of a deceased judgment-debtor.

THE facts of this case were that Ghaneshyam Nusker, the husband of the plaintiff, held a tenure standing in the name of Mukhtaram Sen, and consisting of $8\frac{1}{2}$ bighas of land, at a rental of Rs. 14 per annum, under defendant No. 1 (Bibi Jarao Koeri) and one Tarini Churn Bose deceased, each of whom was entitled to an eight annas share of the rent; that although no arrears of rent of the tenure were due, defendant No. 2, in collusion with defendants Nos. 10 and 11, who were the agents of defendant No. 1, induced defendant No. 1 to bring a suit for rent against

* Appeal from appellate decree, No. 1395 of 1891, against the decree of Baboo Hemango Chundra Bose, Subordinate Judge of Hooghly, dated the 29th of May 1891, affirming the decree of Baboo Bhubon Mohon Ghose, Munsif of Howrah, dated the 31st of March 1890.

Ghaneshyam; that a decree alleged by the plaintiff to be fraudulent and collusive was obtained in that rent suit on 14th Joisto 1294 (27th May 1887), about which time Ghaneshyam died; that as the heir and legal representative of Ghaneshyam, the plaintiff was in possession of the tenure up to 25th Bhadro 1295 (9th September 1888); that in execution of the decree, in which the plaintiff was not substituted as a party, about 17 bighas of land, including the land in suit, were attached and sold and purchased for Rs. 175 by defendant No. 2, on the 23rd April 1888; and that defendant No. 2 obtained khas possession on 9th September 1888.

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The plaintiff, who alleged that she first became aware of the collusive suit, decree, and sale on 13th September 1888, prayed that the decree be set aside as fraudulent, or declared ineffectual as against her; that the sale be set aside as fraudulent and illegal; and that her title to the lands in suit be declared and khas possession be given to her.

Defendants Nos. 1, 2, 10 and 11 put in appearance. They contended that the plaint disclosed no cause of action, and that the suit was bad for misjoinder; and they denied collusion, and that the rent decree and the sale were fraudulent and illegal. Defendant No. 2 also contended that he was a *bonâ fide* purchaser for value.

The Munsif found that although the decree was passed against Ghaneshyam and others, and Ghaneshyam's name should have been mentioned in the petition for execution under cl. (b), s. 235, of the Civil Procedure Code, the name of his widow, the plaintiff, was introduced as a party; that no notice under s. 248 of the Civil Procedure Code was issued to enforce the decree against the legal representative of Ghaneshyam, nor was any application made to substitute Gunamoni in the place of Ghaneshyam, and that without such notice the decree-holder caused the tenure of Ghaneshyam to be attached and sold. He also found that defendant No. 2 was not a *bonâ fide* purchaser for value. He came to the conclusion that defendant No. 1 had obtained his decree fraudulently, and that the subsequent proceedings up to the sale were also fraudulent, irregular, and illegal, and upon the authority of *Ramesuree Dasse v. Doorgadass Chatterji* (1) were void.

(1) I. L. R., 6 Calc., 103; 7 C. L. R., 85.

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The Munsif accordingly set aside the decree and sale, and made a decree declaring the plaintiff's right to the lands in suit and to possession.

On appeal, the Subordinate Judge upheld the findings of the Munsif, but differed from him in finding that defendant No. 2 was a *bonâ fide* purchaser for value. With regard to the question whether, being a *bonâ fide* purchaser, his purchase should be set aside, although the decree in execution of which the sale was held had been set aside, the Subordinate Judge referred to the following cases :—

Jan Ali v. Jan Ali Chowdhry (1), *Tuffazal Hossein Khan v. Raghunath Prasad* (2), *Rewa Mahton v. Ram Kishen Singh* (3), and *Vasappa v. Dundaya* (4), and after pointing out that the real distinction in these cases was one affecting the jurisdiction of the Court to order the sale, he proceeded—

“The point to be determined, therefore, is whether the Court had jurisdiction to order the sale. It has already been noticed that the notice under s. 248 was not issued, and according to the decision quoted by the Munsif, and also the case of *Imamunnessa Bibi v. Liakat Husain* (5), the effect of the omission is to invalidate the subsequent proceedings and to take away the power of the Court to order the sale. In this view of the case, I am bound to hold that the auction purchaser, although he had purchased *bonâ fide*, has acquired no title, and that the judgment of the Munsif is correct.”

The Subordinate Judge accordingly dismissed the appeal.

Defendant No. 2 appealed to the High Court.

Baboo *Boido Nath Dutt* for the appellants.

Baboo *Saroda Prosunno Roy* for the respondent.

The Court (NORRIS and BEVERLEY, JJ.) delivered the following judgments :—

NORRIS, J.—The question which we have to decide in this case is whether the failure of the Court to issue notice to the representative of the deceased judgment-debtor is an irregularity only, or is

(1) 1 B. L. R. A. C., 56 ;
 10 W. R., 154.

(2) 7 B. L. R., 186.

(3) I. L. R., 14 Calc., 18 ; L. R.
 13, I. A., 108.

(4) I. L. R., 2 Bom., 540.

(5) I. L. R., 3 All., 424.

such an illegality as vitiates a sale which has taken place without such notice having been served. We have been referred by the learned pleader for the appellant to a considerable number of cases dwelling upon the distinction between an irregularity and an illegality. Indeed, I suppose I may fairly say all the cases have been brought to our notice. I confess that there appears to me to be an apparent contradiction between some of them. None of them is on all fours with this case: not one is entirely in point.

I am of opinion that the issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of the decree against the representative of the deceased judgment-debtor. I agree with the judgment of the Subordinate Judge, and I think this appeal must be dismissed with costs.

BEVERLEY, J.—I concur with my learned colleague in dismissing this appeal. Having regard to the provisions of s. 248, 249, and 250 of the Code of Civil Procedure, it seems to me clear that until notice is issued on the legal representative of the judgment-debtor, the Court has no jurisdiction to issue its warrant for the execution of the decree.

The appeal is therefore dismissed with costs.

C. D. P.

Appeal dismissed.

PRIVY COUNCIL.

GREENDER CHUNDER GHOSE (PLAINTIFF) *v.* TROYLUCKHO
NATH GHOSE AND OTHERS (DEFENDANTS).

P. C.*

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November

10 & 11.

[On appeal from the High Court at Calcutta.]

Dead, construction of—Construction of deeds releasing future and contingent interests—Agreement excluding a possible question between the parties as to the effect of words in a will, under which they took their rights.

Three brothers, under their father's will, were entitled, each on attaining full age, to the testator's residuary estate in equal shares. When all had attained full age, two having been minors at the testator's death, they effected a separation of their interests derived from the will, and

* *Present*: LORDS HOBHOUSE, MACNAGHTEN, and SHAND, and SIR R. COUCH.

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