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Now two broad orders were passed in this case, *first*, by the Munsif and, *second*, by the lower appellate court. None of these courts had any jurisdiction to pass their respective orders. This, therefore, was a fit case to set right the wrong order of the Munsif. Section 115 of the Code of Civil Procedure empowers the court to act *suo moto* or an application of the aggrieved person, nor is there any limit of time prescribed for it. In fact the decree-holder need not have come to this court if he had obtained an order of the District Judge, however wrong and without jurisdiction. Therefore, this court having been apprised of an order without jurisdiction passed by the Munsif should have set aside that order under section 115 of the Code. Authorities are not wanting where in such cases the High Court exercised their revisional jurisdiction under section 115 of the Code [*Andrew Anthony* v. *Rev. J. M. Dupont* (1), *Zamiran* v. *Fateh Ali* (2), and *Debi Das* v. *Ejaz Husain* (3).]

I therefore decree this appeal and set aside the order of the learned Judge as well as that of the Munsif and consequently the sale in execution is set aside. In the circumstances I make no order as to costs.

Ross, J.—I agree.

Order set aside.

APPELLATE CIVIL.

Before Dawson Miller, C. J., and Coutts, J.

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Dec., 20.

MUSSAMMAT JANAKBATI CHAUDHRAIN,

v.

MAHARAJADHIRAJ RAMESHWAR SINGH BAHADUR *

Code of Civil Procedure, 1908 (Act V of 1908) Order XXI, rules 72, 86, 92, and section 151 — Execution sale——permission granted to decree-holder to bid upon conditions——conditions not fulfilled, whether decree-holder auction purchasers entitled to set off decretal amount against purchase money——power of court to refuse to confirm the sale.

* Appeal form original Order No 232 of 1920, from an order of B. Akhauri Nityananda Singh, Subordinate Judge of Darbhanga, dated the 6th July, 1920.

(1) (1882) I. L. R. 4 Mad. 217. (2) (1905) I. L. R. 32 Cal. 146.
(3) (1906) I. L. R. 28 All. 72.

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Where the court has granted leave to the decree-holder to bid at an execution sale upon the representation that he has fulfilled certain conditions, whereas in fact such conditions have not been fulfilled, the court has power to refuse to confirm the sale apart from the provisions of Order XXI, rules 72 or 92, either under rule 86 or under its inherent powers.

Where, in an application for leave to bid at an auction sale, the decree-holder alleged that he had paid into court the amount due to his judgment-creditor who had attached his decree, whereas in fact the entire amount due to the attaching judgment-creditor had not been deposited, *held*, that the decree-holder was not entitled to have the sale in his favour confirmed before his obligation to his attaching judgment-creditor had been discharged.

The facts of the case material to this report are stated in the judgment of the court.

Appeal by the decree-holder.

Baikuntha Nath Mitter, for the appellant.

Purnendu Narain Sinha and *Murari Prasad*, for the respondents.

DAWSON MILLER, C. J.—This is an appeal on behalf of Janakbati Chaudhurain from an order of the Subordinate Judge of Darbhanga, dated the 6th July, 1920, refusing to confirm a sale made at auction in execution of a decree.

The facts out of which the dispute arises go back to the year 1901 and even earlier but I think they may be stated shortly in so far as they are necessary for determining the questions which arise in this case. It appears that the appellants had a decree before the year 1901 against Fateh Narain and others who are now represented by Nathuni Choudhuri. The Maharaja of Darbhanga who is the respondent in the appeal also had a decree against the appellants and by way of enforcing his decree he attached the decree of the appellants against Fateh Narain and he put up to sale the properties included in that decree on the 17th June, 1901. The properties were sold for the sum of, in round figures, Rs. 12,000, and were purchased by certain persons who were near relations and co-sharers of Fateh Narain. The appellants, although their decree had been attached, obviously had an interest in seeing that that sale was properly conducted, because after payment of the sums due to their attaching creditor, the

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Maharaja, they would be entitled to the balance of the proceeds, if any, of the sale of the property attached. The appellants were not satisfied that that sale had been properly conducted, and they objected to the confirmation of the sale which, however, was confirmed some time in March, 1904. Subsequently the Maharaja withdrew the purchase money in part satisfaction of his decree against the appellants. The appellants then appealed from the order confirming the sale to the High Court at Calcutta, alleging that the sale had been brought about by fraud on the part of the purchasers. The High Court of Calcutta set aside the sale in the year 1907 and in the following year the Maharaja took out further execution proceedings against the same property, not however, until the purchasers under the original sale had filed an application for leave to appeal from the decision of the High Court of April, 1907, to the Privy Council. Although the sale was set aside there was an appeal to the Privy Council and therefore the Maharaja retained in his possession the sum of Rs. 12,000, the purchase money, pending the decision of the Privy Council. This, however, it was obvious he would have to restore with interest in the event of the Privy Council confirming the decision of the High Court, and after the renewed application for execution of the decree in the year 1908 it appears that some accounts were taken between the Maharaja and the purchasers of the property at the original sale in which the Maharaja very properly gave credit for this sum of Rs. 12,000 odd which he still had in his possession although it might turn out in future that he might have to refund it. The Privy Council decision was not delivered until the year 1917. By that decision the decree of the Calcutta High Court of April, 1907, was confirmed and the appeal dismissed. The result was that the Maharaja had to refund the Rs. 12,000 together with interest at 6 *per cent* from the date when he withdrew it from Court in the year 1904 up to the date when he returned it to the persons entitled to it, the purchasers.

In 1918 the Maharaja again took out execution against the same properties and the sale proclamation

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and notices were issued, and, in pursuance of the proclamation, some of the property was sold in December, 1919, and some was subsequently sold in March, 1920. At both these sales the appellants applied for and obtained leave to bid at the sale, and they have in fact purchased the greater portion of the properties sold. When the period arrived for confirming these sales the respondent, the Maharaja, applied to the Court of the Subordinate Judge not to confirm the sale, and two questions were raised and relied upon by the appellants in support of their contention that these sales ought to be confirmed. I have already stated that the property sold was sold under a decree obtained by the appellants against their judgment-debtors and that that decree had been attached by the Maharaja of Darbhanga and put in execution by him. *Prima facie*, therefore, he was entitled to be paid first out of the proceeds of these sales what was due to him under his decree against the appellants, and, after he was satisfied, any balance remaining would have to be paid to the appellants in satisfaction of the balance which they were entitled to recover against the judgment-debtors. Now what happened was this. In the first place there was some dispute as to the exact amount that was due from the appellants to the Maharaja. The appellants contended that as the Maharaja had been in possession for something like 19 years of this sum of Rs. 12,000 odd which he took out of court after the original sale of 1901 he ought not to be allowed any interest upon that part of the sum due to him which was equivalent to the amount he took out of court, and it was even contended that he ought to give credit for the principal sum of Rs. 12,000 which he had had in this possession for so long but had subsequently been compelled to restore to the purchasers I confess I am quite unable to see upon what principle of law the appellants rely in support of such a proposition. The appellants were under a legal obligation to pay to the Maharaja the decretal amount due under the Maharja's decree against them together with interest at 6 *per cent per annum* until payment. This obligation they could have discharged at any moment by paying the decretal amount and

interest and so have avoided the necessity of going on paying further interest as the years accumulated, and the mere fact that by reason of a sale which was subsequently set aside the Maharaja had taken out of court the proceeds of that sale and kept them for a certain period, being afterwards compelled by process of law to restore the sum together with interest to the purchasers to whom it belonged, the sale having been set aside, can have no sort of bearing upon the obligation which the appellants were under by reason of the decree against them. If the sale had been confirmed no doubt the Maharaja would have been entitled to retain the Rs. 12,000 and, *pro tanto*, the amount of the appellants' liability to him would have been extinguished on the date when the money was taken out of court, and, therefore, no interest on that part of the decretal amount would have been payable from that date, but as that sale was set aside and as the money had to be returned with interest the parties were afterwards in exactly the same position as if that sale had not taken place. I think, therefore, that the learned Judge from whose decision this appeal was brought was perfectly right in refusing to uphold the contention of the appellants upon that part of their case, that being so it is clear that the amount payable under the decree becomes really one of arithmetic. Taking the decretal amount altogether with interest allowed by the decree and finding what the total is upon a certain date, deducting from that total the sums, if any, which have already been paid in part discharge of the decree. But certainly the sum of Rs. 12,000 which was for a time in the pocket of the Maharaja cannot be deducted so as to minimise the liability under that decree.

The next point, and the only other point, arises in this way. When the property was about to be put up for sale the appellants applied to the Court asking, in effect, that they should be allowed to bid at the sales, and that, after satisfying the decree of the Maharaja of Darbhanga against them, they should be entitled to set off against the purchase price the sums due to them by the original judgment-debtors under the appellants' decree, and when the sales took place in December

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as I have already said the property was bid for and purchased by the appellants amounting to a considerable sum. They did, apparently, from accounts which have been produced pay into court something, but in their calculataion of what was due to the Maharaja they took into account the fact that he had had Rs. 12,000 in the year 1904 together with interest up to within a short time before the sales took place. This of course as I have already stated was not a sum which they were entitled to take into account. Therefore, the result was that they deposited in Court out of the purchase money a sum considerably less than that which was due in fact to the Maharaja under his decree. The sales however which took place in December were subsequently confirmed. Again in March further property was sold under the same execution proceeding and on that occasion again the appellants petitioned the Court by a petition, dated the 10th January, 1920, asking that they might be allowed to bid at the auction sale. They did not in terms in that petition ask that they might set off against the purchase price the sums due to them under their decree against the judgment-debtors. They merely asked that they might bid at the sales, but in that petition they definitely stated that the entire decretal money due to the Maharaja, that is, to the respondent—

> "Stands deposited in this court as per sale proceeds and also as per deposits made on behalf of your petitioners, the decree-holders."

That statement I am not suggesting was deliberately false, but it was inaccurate. It was not true that the amount due from them to the Maharaja had been deposited in the previous sale. The Court, however, upon this application, which was an *exparte* application, relying upon that statement, made an order that they should be entitled to bid at the sales. They did bid and they purchased some of the property and now the question arises whether, having obtained leave to bid in accordance with the provisions of Order XXI, rule 72, of the Civil Procedure Code, they are entitled to set off against the purchase money due from them the amount still owing to them under the decree

which they held against the judgment-debtors, Rule 72 of Order XXI provides by clause (2) that

"Where a decree-holder purchases with such permission", that is the permission of the Court, "the purchase money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

It is contended that although they had not complied with the undertaking in their petition for leave to bid in the December sales and although in the petition for leave to bid at the subsequent sales they had stated inaccurately that the entire decretal money due from them to the Maharaja had been deposited in Court in the previous sale, they are nevertheless entitled to discharge their liability as purchasers merely by set off without in fact depositing sufficient money to pay what is justly due to the attaching-creditor. They contend that under rule 72 of Order XXI, once permission has been granted, the Court has no option but to allow them to set off. It is not necessary in my view to determine whether under clause (2) of rule 72 it is the purchaser or the Court which may determine whether the set-off shall be allowed but I think that when the order was made by the Court on the application of the 10th January to bid at the subsequent sales, that order granting leave was only made upon the condition that the entire decreetal money due to the Maharaja had in fact been deposited in Court. That was the allegation made in the petition and that must have been one of the conditions which the Court assumed to have been fulfilled before the Court granted the permission. Then the question arises whether in these conditions there was an absolute power given to the appellants to bid at the sale or whether it was a power subject to a certain condition having been fulfiled. I think that the latter view is the proper view to take. That condition turns out not to have been fulfilled and therefore it seems to me perfectly clear that the Court has power, apart altogether from rule 72 and from the provisions contained in rule 92 of Order XXI, either under rule 86 or under its inherent powers, to refuse to confirm a sale unless the conditions alleged to have

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been fulfilled by the appellants when they obtained the order are in fact fulfilled. That was the view taken by the learned Judge although he in fact based his decision upon the powers granted to the Court under rules 72. In the broad determination of the case I think the learned Judge was right. The only real question for us to decide is whether in the particular circumstances of this case the undertaking given, or at least the representation made by the appellants in their application for leave to bid, ought to be fulfilled before the Court allows the sale to be confirmed. It seems to me that the Court never would have permitted the appellants by bidding at the sale to discharge their obligation as purchasers by setting off against the purchase money the amount due under their decree, without taking into account at all what was due from them to the attaching-creditor. It is obvious that the attaching creditor had a first charge upon the properties sold and the order made by the Court was in my opinion an order made upon the assumption that that charge was satisfied out of the sale proceeds and the order was conditional upon that charge being satisfied. The condition was not fulfilled and I think the sale should not be confirmed until it is. In my opinion the appeal should be dismissed with costs.

COUTTS, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Das and Bucknill JJ.

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Dec., 20.

BAZARI HAJAM.

v.

KING-EMPEROR.*

Thumb Impression——of accused should not be taken during trial ——conviction should not be based on thumb impression alone—— Registration Act (Act XVI of 1908), section 82 (c) and (d).

* Criminal Appeal No. 176 of 1921 against the conviction and sentences passed by H. W. Williams, Esq., Sessions Judge, Shahabad, dated the 30th September, 1921.