

remarks made above that the accused was morally justified in the step he took. He may have acted with most reprehensible rashness and recklessness in giving such information to the Collector. It is not enough however to show that. For the circumstances which are necessary to bring a case within section 182, Indian Penal Code, involve different considerations from those that arise from section 211, Indian Penal Code. Section 182, Indian Penal Code, does not necessarily impose upon the person giving information to the officer, criminal liability for mere want of caution before giving that information. There must be positive and conscious falsehood established.

Finding as we do that the charge has not been legally sustained, we reverse the conviction and direct the fine, if paid, to be refunded.

R. R.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.J.E., Chief Justice, and
Mr. Justice Beaman.*

PITA VALAD MOTI (ORIGINAL JUDGMENT-DEBTOR), APPELLANT, v. CHUNILAL HARAKCHAND AND TWO OTHERS (ORIGINAL JUDGMENT-CREDITOR, AUCTION-PURCHASER AND APPLICANT FOR RATEABLE DISTRIBUTION), RESPONDENTS.*

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November 29.

Civil Procedure Code (Act XIV of 1882), sections 320, 310A and 244—Execution of decree—Sale by Collector—Application to Court by judgment-debtor to set aside sale—Refusal by the Court—Appeal—Collector's power—Rules 16 and 17(1) of the Local Rules and Orders made under enactments applying to Bombay.

* Second Appeal No. 354 of 1905.

(1) Rules 16 and 17 of the Local Rules and Orders made under Act XIV of 1882 run as under :—

(16) The following powers are conferred on Collectors or such of their Gazetted Subordinates to whom a decree has or may hereafter be referred under Rule 4 :—

(1) The power referred to in section 294 of the Code of Civil Procedure to grant express permission to the holder of a decree, in execution of which property is sold, to bid for or purchase the property : Provided that the Collector or other officer aforesaid, to whom an application for such permission may be made, shall not grant such permission unless the decree-holder (a) satisfies him that the application is made in good faith, and that the judgment-debtor is not a minor ; (b) under

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A decree having been transferred to the Collector for execution under section 320 of the Civil Procedure Code (Act XIV of 1882), he sold certain properties. Thereupon the judgment-debtor applied to the Court for the setting aside of the sale under section 310A of the Code. The Court refused to set aside the sale on the ground that there was another decree-holder who had taken action under section 295 of the Code, and that it was incumbent on the judgment-debtor to pay into Court a sum sufficient to answer his claim. On appeal by the judgment-debtor the Judge dismissed the appeal on the ground that no appeal lay.

Held, on second appeal by the judgment-debtor, that the order was appealable.

An appeal lies from an order under section 310A of the Code where the case falls under section 244 (c).

Murlidhar v. Anandrao (1) qualified.

A question under section 310A of the Code may be one relating to execution, discharge or satisfaction of the decree or to the stay of execution thereof.

“When a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result, has never been held a bar to the application of the section, *i. e.*, section 244”: *Prosunno Coomar Sanjal v. Kasi Das Sanjal* (2) applied.

Section 310A of the Code applies even if the execution proceedings be referred to the Collector, who has no power to set aside a sale under the provisions of the Code. There is nothing in the section which precludes the Court from setting aside the sale merely because it had been confirmed.

As section 310A prescribes that the Court *shall* pass an order setting aside the sale whenever its provisions are complied with, the order refusing to set aside the sale reversed.

takes that he will not himself or through any other person bid or purchase for a sum less than such amount as the Collector or other officer granting the permission, having regard to the fair market value of the interest to be sold, may determine, and that the permission shall be subject to this condition; (c) agrees that if the decree-holder or any one on his behalf becomes the purchaser, the purchase money shall be paid to the Collector or other officer executing the decree.

(2) The power referred to in paragraph 1 of section 312, Civil Procedure Code, to pass an order confirming a sale if no application to set the sale aside has been made within the time limited by law, or if every application so made has been disallowed.

(17) If any application to set aside a sale be made within the time limited by law to the Collector or other officer aforesaid, he shall refer the applicant to the Civil Court:

(1) (1900) 25 Bom, 418.

(2) (1892) L. R. 19 I. A. 166.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Khándesh, dismissing an appeal against the order of V. V. Rahurkar in connection with an application under section 310A of the Civil Procedure Code (Act XIV of 1882).

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One Chunilal Harakchand obtained a money decree for Rs. 515 and costs against his debtors Pita Moti and three others. The decree was dated the 3rd June 1900. On the 22nd July following Chunilal gave darkhast, No. 1484 of 1901, for the execution of the decree and to realize the decretal amount by sale of Pita's immoveable property, namely, Survey Nos. 40, 42, 69, 70 and 84. The lands were attached and as the judgment-debtors were agriculturists, the execution proceeding was transferred to the Collector under section 320 of the Civil Procedure Code (Act XIV of 1882). While the execution proceedings were pending before the Collector, Chunilal obtained another money decree against three out of the four judgment-debtors including Pita Moti for about Rs. 700 and assigned it to one Hazarimal Lachiram. On the 6th November 1903 Hazarimal presented darkhast No. 1386 of 1903 to execute the decree assigned to him and applied for rateable distribution under section 295 of the Civil Procedure Code. His application was duly communicated to the Collector on the 12th December 1903.

Subsequently, on the 19th December 1903, the Collector sold Survey No. 42 for ten rupees and he confirmed the sale on the 6th June 1904. The remaining four survey numbers were sold by the Collector on the 19th July 1904 for Rs. 840 and they were purchased by one Devidas Pratapmal. On the 18th August 1904, that is, within thirty days from the date of the second sale, Pita, the principal judgment-debtor, applied to the Collector to set aside the sale under section 310A of the Civil Procedure Code. He deposited in Court Rs. 625 for payment to the attaching creditor Chunilal only and to the purchaser. He did not pay any sum to cover the claim of the other decree-holder Hazarimal. Notices were issued to Chunilal, Hazarimal and Devichand. Hazarimal did not put in an appearance. Chunilal and Devichand appeared by one pleader and opposed the application which was dismissed by the Court on the following grounds :—

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It is argued for the judgment-debtor that on the authority of the rulings (Cal. W. Notes Rule No. 1177 of 1896 and I. L. R. 25 All., p. 434) it was not necessary for the judgment-debtor to pay off the applicant under section 295, as this applicant did not come within the meaning of the word "Decree-holder" and in sub-clause (b) of section 310A. On the other hand, I. L. R. 16 Bom., pages 99 and 100, were cited for the purchaser to show that the claim of the applicant under section 295 is enforceable under the attachment of the original judgment-creditor. It is also contended for the purchaser that, when intimation of the application under section 295 was given to the Collector, the sale must be presumed to have been ordered for the recovery of the claim of this applicant also within the meaning of sub-clause (b) of section 310A. It is true that the amount of this applicant was not mentioned in the proclamation of the sale by the Collector. This appears to be a clerical error. The Collector tried to recover a larger amount than what was necessary to pay off the attaching creditor. Hence no importance can be attached to the clerical omission especially when the applicant knew the claim of the applicant under section 295.

The Allahabad and Calcutta Courts expressly differ from the Bombay ruling. This Court is bound to follow the Bombay ruling and consequently the application must be rejected with all costs on him.

On appeal by the applicant the Judge dismissed the appeal. His reasons were as follows :—

I hold that no appeal lies, the question here being between the judgment-debtor and the purchaser who is not the decree-holder, and the Bombay High Court having ruled in *Maganlal v. Mulji*, 3 Bombay Law Reporter 255—257, that section 244(c) is not applicable to such cases. That case is an express authority against the appellant and I dismiss the appeal with costs.

The applicant preferred a second appeal.

G. K. Dandekar for the appellant (applicant, original judgment-debtor) :—The Judge erred in holding that no appeal lay against the order rejecting our application to set aside the sale under section 310A of the Civil Procedure Code. The ground on which the first Court rejected the application, namely, that we did not pay a sum sufficient to cover the claim of Hazarimal, applicant under section 295 of the Code for rateable distribution, was a ground with which the auction-purchaser was not concerned at all. He is only entitled to get five per centum of the purchase money. The question whether we ought to have paid the money of the other decree-holder is a question between the decree-holder and the judgment-debtor and relates to the satisfaction or execution of the decree. Though the question arises in a proceeding under section 310A, still it is a question which

falls under section 244 (c) and an order passed with respect to it is a decree capable of being appealed against. The presence of the auction-purchaser, who may be interested in the result, cannot take the case out of the purview of that section: *Prosunno Coomar Sangal v. Kasi Das Sangal* ⁽¹⁾. The case of *Maganlal v. Doshi Mulji* ⁽²⁾ referred to by the Judge has no bearing. The case proceeds upon the principle that the expression "between parties to the suit" means parties arranged on the opposite sides and not between one party and his representative.

The following cases were cited and commented upon:—

Kuber Singh v. Shib Lal ⁽³⁾, *Murlidhar v. Anandrao* ⁽⁴⁾, *Srinivasa Ayyangar v. Ayyathorai Pillai* ⁽⁵⁾, *Chundi Charan Mandal v. Banke Behary Lal Mandal* ⁽⁶⁾.

In the present case the attaching creditor, Chunilal, and the auction-purchaser, Devichand, were represented in the first Court by the same pleader, and it must be taken that the objection to the application to set aside the sale must have proceeded at the instance of the attaching creditor, and even if it be that the objection was started by the auction-purchaser, still the question really was between the judgment-debtor and the decree-holder, though the auction-purchaser was and is interested in the result.

As to the merits. The first Court has found that the judgment-debtor had deposited Rs. 625 in Court for payment to the attaching creditor only and to the purchaser. It has also been found that the amount due to Hazarimal, applicant under section 295 for rateable distribution, was not mentioned in the proclamation of the sale. The amount which was deposited was exactly the amount which the judgment-debtor was required to deposit under clauses (a) and (b) of section 310A, namely, five per centum to the purchaser plus "the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered." The judgment-debtor was not bound to deposit anything more: *Hari Sundari Dasya v. Shashi Balu Dasya* ⁽⁷⁾.

(1) (1892) L. R. 19 I. A. 166.

(2) (1901) 25 Bom. 631.

(3) (1904) 27 All. 263.

(4) (1900) 25 Bom. 418.

(5) (1897) 21 Mad. 416.

(6) (1899) 26 Cal. 449.

(7) (1896) 1 C. W. N. 195.

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We are concerned with the wording of section 310A. If the conditions laid down in the section are satisfied, it is imperative upon the Court to set aside the sale. The decision in *Sorabji Edulji Warden v. Govind Ramji* ⁽¹⁾ relied on by the first Court has no application. In that case the subsequent decree-holders, that is, the applicants under section 295, had also attached the property, and it was held that a private alienation made during the continuance of the attachment was void.

S. S. Pathar for respondent 1 (decree-holder) :—An appeal lies under section 310A if the decree-holder is the purchaser. In *Murlidhar v. Anandrao* ⁽²⁾ the purchaser was the creature of the decree-holder. An appeal lies only when the order under section 310A comes within section 244 (c). Here the question is not between us and the judgment-debtor. The question really is between the judgment-debtor and the auction-purchaser, who is now added as a party to the second appeal.

N. M. Patwardhan for respondent 2 (auction-purchaser) who was added as a party to the second appeal :—So far as we are concerned no appeal can lie. We are not the representative of the decree-holder, therefore, section 244 (c) cannot apply.

The proceedings having been sent to the Collector under section 320, he was seized of the proceedings and the application to set aside the sale should have been made to him : *Sheo Prasad v. Muhammad Mohsin Khan* ⁽³⁾, *Mancheryji v. Thalurdas* ⁽⁴⁾. See also Rules 16 and 17 of the Local Rules and Orders made under enactments applying to Bombay.

Respondent 3 (applicant under section 295 of the Civil Procedure Code) was joined as a party to the second appeal, but he did not appear.

JENKINS, C. J. :—This case, which comes before us by way of second appeal, arises out of an application under section 310A to set aside a sale of property sold in execution under chapter XIX of the Code of Civil Procedure.

The facts are briefly these: The original decree-holder Chunilal Harakchand in execution of his decree attached certain

(1) (1891) 16 Bom. 91.

(2) (1902) 25 All. 167.

(3) (1900) 25 Bom. 418.

(4) (1905) 7 Bom. L. R. 682.

properties; and the four survey numbers, which are the subject-matter of the present application, were sold on the 19th of July 1904 for Rs. 840.

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This sale was carried out by the Collector to whom the decree had been transferred in accordance with section 320 of the Code of Civil Procedure.

Within 30 days from this sale the judgment-debtor Pita valad Moti, the present appellant before us, applied to the Court under section 310A to set it aside. That section required as a condition precedent that he should deposit in Court for payment to the purchaser a sum equal to 5 per cent. of the purchase money, and for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which might, since the date of such proclamation of sale, have been received by the decree-holder.

It is not questioned before us that those sums were deposited. But notwithstanding this the Subordinate Judge refused to set aside the sale though the section prescribes that the Court *shall* pass an order setting aside the sale. The ground on which he so refused was that as there was another decree-holder who had taken action under section 295, it was incumbent on the judgment-debtor to pay into Court a sum sufficient to answer his claim.

It appears to us that in so deciding the learned Judge disregarded the express terms of the section.

The judgment-debtor appealed to the District Judge, who however dismissed the appeal on the ground that no appeal would lie.

Thereupon the judgment-debtor presented this second appeal to this Court, and he has now brought before us as respondents the original decree-holder, the auction-purchaser and the decree-holder who took action under section 295. Of these three respondents only the original decree-holder and the auction-purchaser have appeared.

The first question that arises is whether or not the appeal lies.

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There is one case decided by this Court, *Murlihar v. Anandrao*⁽¹⁾, in which it was laid down generally that an appeal lies from an order passed under section 310A, refusing to set aside a sale.

It may perhaps be a question whether the proposition can be correctly stated in this unqualified form.

But however that may be, it is, we think, established by a series of decisions that an appeal will lie from an order under section 310A, where the case falls under section 244 (c) of the Code of Civil Procedure.

Then can we say that the question arising here was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof?

That a question under section 310A may be one relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof, is now established beyond all controversy.

Can it then be said that the question arises between the parties to the suit?

Now we have already indicated the nature of the contention. It was that the judgment-debtor should have paid into Court not merely the amount specified in the proclamation of sale, but also an amount not specified in the proclamation, that is to say, an amount in respect of the claim of Hajarimal, the judgment-creditor, who had taken action under section 295.

This contention implies that sums paid under section 310A are subject to the operation of section 295; and if that were a sound contention, then the result would be that the amount paid would not meet in full the claim of Chunilal, the original decree-holder.

Therefore it is clear that a question arose between the plaintiff and the defendant, that is to say, between the parties to the suit; and this point was actually urged by the pleader who appeared for the decree-holder.

Therefore the order was one within section 244 and as such subject to appeal.

(1) (1907) 25 Bom. 418.

But then it is said that though this may be true as between Chunilal and the judgment-debtor, it does not represent the position as between the auction-purchaser and the judgment-debtor.

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But the answer to that appears to us to be the course of procedure followed where the decree-holder and the purchaser are both concerned, and in reference to this it has been said by the Privy Council in *Prosunno Coomar Sanyal v. Kasi Das Sanyal* ⁽¹⁾ that "when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit is interested in the result has never been held a bar to the application of the section," *i.e.*, section 244.

Therefore we think that this objection cannot be sustained.

Then it has been said that inasmuch as the execution proceedings had been referred to the Collector, section 310A had no application.

Now the transfer to the Collector was under section 320 of the Code of Civil Procedure, and that section provides that the Local Government may, with the sanction of the Governor General in Council, declare by notification in the official Gazette that in any local area the execution of decrees should be transferred to the Collector, and that the Local Government may from time to time prescribe rules for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court. Then the section provides as follows :—“Rules under this section may confer upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector, including the powers of the Court under sections 294 and 312, and may provide for orders passed by the Collector or any gazetted subordinate of the

(1) (1892) L. R. 19 I. A. 166 at p. 169.

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Collector, or orders passed on appeal with respect to such orders being subject to appeal to and revision by superior revenue-authorities as nearly as may be as the orders passed by the Court, or orders passed on appeal with respect to such orders, would be subject to appeal to and revision by appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

“A power conferred by the rules upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.”

The Code however confers no power on the Collector to set aside a sale under section 310A.

Nor is there any rule vesting that power in the Collector. We say this notwithstanding that it was urged before us by Mr. Patwardhan that the Rules 16 and 17 at page 403 of the Local Rules and Orders made under enactments applying to Bombay had the effect of vesting the Collector with power to entertain these applications. His argument appears to have been that Rule 17 necessarily implied that the Collector had the power.

That rule provides that “if any application to set aside a sale be made within the time limited by law to the Collector or other officer aforesaid, he shall refer the applicant to the Civil Court.”

Apart from the fact that the rule was passed before section 310A came into existence, we think it is clear that it cannot be said it implies that the Collector had any power to set aside a sale. In fact the very terms of the rule preclude such a contention.

When an application is made to set aside the sale, what is incumbent on the Collector under the rule is to refer the applicant to the Civil Court; and it will be perceived from that part of section 320, which we have already quoted, that the power conferred by the rules upon the Collector shall not be exercisable by the Court: if the matter be referable to the Civil Court it necessarily implies that the power has not been conferred by the rules on the Collector.

Then reliance has been placed on a decision in *Sheo Prasad v. Muhammad Mohsin Khan*⁽¹⁾, the result of which, Mr. Patwardhan contends, is that when once the execution of a decree is transferred to the Collector, then the judgment-debtor is deprived of the benefit of section 310A of the Code of Civil Procedure.

We cannot believe that this was intended nor as we read the Civil Procedure Code is that its effect, and we think the power to act under section 310A continues notwithstanding a transfer of the execution to the Collector.

The only question is by whom that power is to be exercised. If the power has by rules been vested in the Collector, then it is exercisable by him and not by the Court. If that power has not been conferred on him, then, in our opinion, the power must continue still to be exercisable by the Court.

The next point urged is that the judgment-debtor cannot apply under section 310A, because the sale has already been confirmed by the Collector. But not only was the application made by the judgment-debtor before the sale was confirmed, but there is nothing in section 310A which precludes the Court from setting aside the sale merely because it has been confirmed.

We therefore are of opinion that in this case an appeal lies, and that it was erroneous on the part of the Judge of the subordinate Court to hold that it was incumbent upon the judgment-debtor to deposit in Court anything except that for which section 310A has made provision. The judgment-debtor deposited all that the section required of him, and all its conditions have been performed. We are therefore of opinion that the judgment-debtor was entitled to have an order under that section setting aside the sale.

We therefore reverse the decree of the lower Court and direct that the sale be set aside and the appellant get his costs throughout.

Decree reversed.

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(1) (1902) 25 All.187.