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cannot be decided on mere suspicion. On this subject the Judicial Committee in the case of *Sreeman Chunder Dey* v. *Gopal Chunder Chuckerbutty* (1) at p. 43 of the report say as follows :—

"Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the applicant, but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds established by legal testimony."

In another case—*Moonshee Buzloor Ruheem* v. *Shamshoonissa Begum* (2)—in the same volume at p. 602, they say :—

"The habit of holding land *benami* is inveterate in India but that does not justify the Courts in making every presumption against apparent ownership"

[548] Under s. 280 what one has to see is apparent ownership, combined with the fact that the ownership is not in trust for the judgment-debtor.

It is not necessary for me to express an opinion on the evidence regarding the relative means of Radha Kristo and Panna Lall Dassee, nor as to the reality of the money-lending business which Panna Lall Dassee said she carried on.

I ought to add, however, that the story of Radha Kristo being possessed of Rs. 10,000 or that he told the decree-holder that he had so much money in his box is in my opinion untrue. On the whole, however, I am of opinion, confining myself to the subject of enquiry and the question I have to decide, that the securities which have been taken in attachment by the decree-holder in this instance were not held by the claimant in trust for the judgment-debtor, and that consequently there must be an order directing the release of the property under attachment.

Attorneys for the plaintiff decree-holder : *Fox and Mondle.*

Attorneys for the claimant : *Leslie and Hinds.*

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APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Brett.

BEJOY SINGH DUDHURIA *v.* HUKUM CHAND.* [6th June, 1902.]

Decree-holder—meaning of,—Civil Procedure Code (Act XIV of 1882), ss. 311 and 295—Execution—What class of decree-holder can come in under s. 295—Locus standi—Appeal.

The "decree-holder" in s. 311 of the Civil Procedure Code includes any decree-holder for the enforcement and satisfaction of whose decree the sale has been held, and would therefore include all decree-holders who, prior to sale, have applied to the Court under s. 295 for execution of their decrees. *Lakshmi* v. *Kuttunni* (3) and *Chattrapat Singh* v. *Jadukal Prosad Mukerjee* (4) referred to.

A obtained decree on the Original Side of the High Court against *B*, and transferred it to the District Judge at Moorshedabad for execution, who **[549]** again transferred it to the Subordinate Judge, where the execution proceedings were registered and a date was fixed for the sale of *B's* immoveable property attached by *A* in execution of his decree. Before the date fixed for

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* Appeal from Original Order No. 361 of 1901 made against the order passed by J. E. Webster, Esq., District Judge of Moorshedabad, dated the 12th of July 1901.

(1) (1866) 11 M. I. A. 28.
(2) (1867) 11 M. I. A. 551.
(3) (1886) I. L. R. 10 Mad. 57.
(4) (1892) I. L. R. 20 Cal. 673.

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sale, *C*, who had also obtained a decree against *B*, applied to the District Judge at Moorshedabad for attachment and sale of the property of *B*. *B*'s property was attached and sold in execution of *C*'s decree; but, prior to the sale, several other persons who held decrees against *B* having applied to the District Judge for execution of their decrees, the sale-proceeds were rateably distributed amongst them all. Thereupon *A* made an application to the District Judge to set aside the said sale under s. 311.

***Held* that, inasmuch as *A* was not entitled to come in and share in the rateable distribution of assets under s. 295, he was not the decree-holder within the meaning of s. 311, and had therefore no *locus standi* to make an application under that section.**

***Matungini Dassi* v. *Monmotha Nath Bose* (1) referredto.**

An appeal lies from an order passed under s. 312, refusing to set aside a sale on the ground that the applicant had no *locus standi* to apply under s. 311.

THE petitioner Bejoy Singh Dudhuria appealed to the High Court.

This appeal arose out of an application to set aside a sale under s. 311 of the Civil Procedure Code. The petitioner obtained a decree against one Chattrapat Singh on the Original Side of the High Court for a sum of Rs. 345-11. On the 8th November, 1900, the decree-holder attached certain immoveable property belonging to the judgment-debtor in the district of Moorshedabad, and the sale was fixed for the 15th January, 1901. At the instance of Sripat Singh, the son of the said Chattrapat Singh, a claim having been put forward by him, the sale of one-third of the property was stayed by an order of the High Court; but the sale of the remaining two-thirds share of the said property was fixed for the 15th July, 1901. The decree which the petitioner had obtained on the Original Side of the High Court was transferred to the Court of the District Judge for execution, and was thereafter transferred by that Court to the Court of the Subordinate Judge. There were various other decrees, similarly transferred, pending in the Court of the said Subordinate Judge. On the 23rd May, 1901, the petitioner came to know that the said property, which was worth Rs. 60,000, was sold in the Court of the District Judge of Moorshedabad for the sum of Rs. 12,000, in execution of a decree obtained by Hukum Chand and Tara Chand **[550]** against the said judgment-debtor, and was purchased by the respondent, Bissun Chand Baihant, on the 22nd May, 1901. It appeared that, prior to that sale, several other decree-holders had applied to the District Judge's Court for the execution of decrees held by them against Chattrapat Singh. In the month of July, a rateable distribution of the proceeds of the sale was made among them by the District Judge. On the 20th of June the present application was made by the petitioner for setting aside the sale. The Court below, having held that the petitioner, being only an attaching creditor, had no *locus standi* under s. 311 of the Civil Procedure Code, rejected the application.

Mr. *C. P. Hill* and Baboo *Mahendra Kumar Mitter* for the appellant.

Mr. *J. T. Woodroffe* (Advocate-General), Dr. *Rash Behary Ghose*, Baboo *Khetter Mohun Sen* and Babu *Manmotha Nath Mookerjee* for the respondent.

HILL AND BRETT, JJ. This is an appeal against an order passed by the District Judge of Moorshedabad on the 12th July, 1901, rejecting an application made by the appellant under the provisions of s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree on the ground of fraud or material irregularity in the conduct of it.

(1) (1900) 4 C. W. N. 542.

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The facts of the case, as they are to be gathered from the materials before us, are as follows. On a date which does not appear, the appellant obtained a decree on the Original Side of this Court against the respondent, Chattrapat Singh, who may be referred to as the judgment-debtor, for a sum of Rs. 11,345-11. This decree was transferred to the Court of the District Judge of Moorshedabad for execution, and was thereafter transferred by that Court to the Court of the Subordinate Judge, where the proceedings in execution were registered as case No. 93 of 1900. When these transfers took place we are not informed, but on the 8th November 1900 the appellant caused a house with the appurtenant land and premises, belonging to the judgment-debtor and situated at Baluchar, in the district of Moorshedabad, to be attached and advertised for sale in execution [551] of his decree. The sale was fixed in the first instance for the 15th January, 1901, but in consequence of a claim put forward by the judgment-debtor's son to a one-third share of the property, it was stayed. Subsequently the appellant applied for the sale of a two-third share only of the property, and on that application the 15th July, 1901, was the date fixed for sale.

Before that date, however, namely, on the 13th February 1901, the respondents, Hukum Chand and Tara Chand, who held a decree of a Court of Small Causes against the judgment-debtor, which had also been transferred to the Court of the District Judge of Moorshedabad for execution, and there retained, applied to that Court for attachment and sale of the judgment-debtor's house and premises at Baluchar. They were attached accordingly in March, 1901, and were brought to sale and purchased for Rs. 12,000 by the respondent, Bishen Chand Baihant, on the 22nd May following. Prior to that date, it appears that several other decree-holders had applied to the District Judge's Court for execution of decrees held by them against Chattrapat Singh and, in the month of July, a rateable division of the proceeds of the sale was made among them by the District Judge. On the 20th June the application, out of which this appeal has arisen, was preferred by the appellant to the District Court, and was disposed of on the 12th July along with another application of a similar kind made by one *Golap Chand Barjid*, the appellant in appeal from original order No. 394 of 1901.

With the merits of the appellant's application we are not now concerned. It was dismissed by the District Judge on the authority of *Matungini Dassi* v. *Monmotha Nath Bose* (1), on the ground that the appellant had no *locus standi* to apply to the Court to set aside the sale of the 22nd May, and whether the learned District Judge was correct in so holding is the only question raised by this appeal. Before proceeding to consider that question, it is, however, necessary to notice an objection to the competency of the appeal taken for the respondents by the learned Advocate-General. His contention was that the appellant, having no *locus standi* to apply under s. 311 of the Code, was not in a position to avail himself of the provisions of cl. 16 of [552] s. 588, upon which the right of appeal depended. There is, however, in our opinion no force in the contention. The objection begs the question at issue in the appeal and confuses the right to apply under s. 311 with the right of appeal against an adverse order made under that section. If the appellant had no *locus standi* to apply under s. 311, he will fail on that ground. But even if

(1) (1900) 4 C. W. N. 542.

this be so, we have no doubt that he had a right of appeal to this Court for the purpose of determining whether he had a *locus standi*.

Upon the argument of the latter question Mr. Hill's contention for the appellant was twofold. He argued first that the term "decree-holder" occurring in s. 311 was to be read as embracing all holders of decrees who are entitled under s. 295 to come in and share in the rateable division of assets for which the section provides, and that his client, having attached the judgment-debtor's property prior to its sale under the decree of Hukum Chand and Tara Chand, was so entitled. Then he argued that, if the term "decree-holder" be not susceptible of so wide an interpretation, his client was at all events to be regarded as a person "whose immoveable property has been sold" within the meaning of s. 311. The reasoning by which he sought to sustain the latter position was that his client, being entitled under s. 295 to a share in the proceeds of the sale of the judgment-debtor's property, was entitled to a benefit to arise out of land which, under the definition of immoveable property, contained in the General Clauses Act (Act X of 1897), must be regarded as immoveable property. His client was, therefore, the conclusion was, a person whose immoveable property had been sold under Chapter XIX of the Code, and he was consequently entitled to come in under s. 311 and apply to have the sale set aside.

A great many authorities were cited by Mr. Hill in support of these propositions, but it appears to us that it would serve no useful purpose now to refer to them in detail. Both his contentions rest upon the assumption that the appellant had done what the law requires in order to entitle him to share in the division of assets for which s. 295 provides. That assumption is not, however, warranted by the actual facts of the case. S. 295 provides that "whenever assets are realized by sale or otherwise [553] in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization shall be divided rateably among all such persons." What the section therefore prescribes, in order to entitle a decree-holder to participate in the assets realized, is that he should have applied to the Court which holds the assets prior to the realization for execution of his decree and have failed to obtain satisfaction. In the present case, the Court holding the assets was the Court of the District Judge of Moorshedabad, but, so far as appears, no application for execution was at any time made by the appellant to that Court. His decree, though no doubt transferred in the first instance to the District Court for execution, was afterwards transferred to the Court of the Subordinate Judge, and it was in the latter Court that the proceedings for the execution of it were pending when the sale took place. This being so, it appears to us that, as a decree-holder who had merely attached the property in another Court, he acquired neither an interest nor a right to participate in the assets realized by the sale; and since his claim to be a decree-holder in the sense of s. 311 can, we think, be sustained only on the ground that the sale was in substance for the enforcement of his decree, equally with those of such other decree-holders as might prior to realization have applied for execution to the District Court, it seems to us to be impossible in the actual circumstances of the case to assign to him the character claimed for him. He was in point of fact a stranger to the proceedings in the District Court; and being incapable, by virtue merely of his attachment, of taking

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any benefit under the sale, it is further difficult to perceive how the proviso to s. 311 which requires that the person applying under the section should be in a position to show that he had sustained substantial injury by reason of the irregularity complained of, could in his case be satisfied. The facts were similar in the case of *Matungini Dassi* v. *Monmotha Nath Bose* (1) relied on by the learned District Judge and, although we should hesitate to adopt the interpretation placed in that case on the term "the [554] decree-holder," which appears to us to be unnecessarily limited, we yet think that the case was rightly decided, for the applicant under s. 311 there had not, as the learned Judges observe, applied under s. 295 or entitled himself to a rateable distribution of the assets. But in our opinion the words "the decree-holder" in s. 311 may be properly so construed as to include any decree-holder for the enforcement or satisfaction of whose decree the sale has been held, and would therefore include all decree-holders who, prior to sale, have applied to the Court under s. 295 for execution of their decrees. All such persons are equally interested in the result of the sale; and should the sale have been held technically in execution of a particular decree, that appears to us to be matter of form rather than of substance. But we do not think that the words in question can be legitimately extended further. In this view we are supported by the case of *Lakshmi* v. *Kuttunni* (2) as well as by *Chattrapat Singh* v. *Jadukul Prosad Mukerjee* (3), in which *Lakshmi* v. *Kuttunni* (2) was approved of, and which, moreover, is itself a direct authority against the appellant's present contention.

For these reasons Mr. Hill's first point, in our opinion, fails, but, before leaving it, we wish to refer to the case of *Asmutunissa Begum* v. *Ashruff Ali* (4), upon which Mr. Hill placed much reliance. There the point actually decided by the Full Bench was that a person who claims to be a purchaser from a judgment-debtor prior to attachment is not entitled to come in under s. 311 of the Code and object to the sale of the property. The decision is therefore beside the present question, but the case was relied upon in consequence of the approval expressed in the judgment of the Court of the case of *Krishnarav Venkatesh* v. *Vasudev Anant* (5), which decided that a puisne attaching creditor was entitled to apply under s. 256 of Act VIII of 1859 to have a sale held in execution of the decree of a senior attaching creditor set aside. But as we understand the judgment of the Full Bench, the views of the Bombay Court were adopted only in so far as they required [555] that a person applying to set aside an execution sale should show that he had suffered substantial injury thereby in the sense that his interest in the property had been legally affected by it, and it was held consequently that a person, claiming by title paramount to the judgment-debtor, did not come within the meaning of the words "any person" in s. 311, inasmuch as his title to the property could not be affected by the sale. We do not think that the Full Bench intended on the authority of the Bombay case to give its sanction to the view that any decree-holder who had attached the property of the judgment-debtor prior to sale may come in under s. 311 of the existing Code to have the sale set aside, and, unless the case goes that length, it can hardly assist Mr. Hill's client. There was no such question before the Court; and had it been intended to refer to it, however remotely, there would have been, we conceive, some allusion at all events in the

(1) (1900) 4 C. W. N. 542.
(2) (1886) I. L. R. 10 Mad. 57.
(3) (1892) I. L. R. 20 Cal. 673.
(4) (1888) I. L. R. 15 Cal. 488.
(5) 11 Bom. H. C. 15.

judgment to the changes made in the law since the Bombay case was decided. The Bombay case was itself, we may add, relied upon as an authority in the appellant's favour, but the alterations introduced into the law by s. 311 and s. 295 of the existing Code render it, we think, as an authority on the question now under consideration of little value. Upon that question, moreover, it was dissented from in the case of *Mussamat Maina Koer* v. *Luchmun Bhuggut* (1), while Act VIII of 1859 was still in force.

There remains Mr. Hill's alternative contention that his client came within the words of s. 311—"any person whose immoveable property has been sold," and he relied in support of it on the recent Full Bench decision in *Paresh Nath Singha* v. *Nabo Gopal Chattopadhya* (2), where the same words, occurring in s. 310A, were so construed as to let in a mortgagee of a tenure or holding sold for arrears of rent under the Bengal Tenancy Act. The argument was that, inasmuch as the Court executing a decree sells for the benefit of the attaching creditors, they have an interest in the property sold in the same sense as it was decided in that case that a mortgagee is interested in the mortgaged property. If we are right in the view that in the present case the Court sold [556] for the benefit of those persons only who had entitled themselves under s. 295 to share in the division of assets, the ground upon which this argument rests is cut away. But it may be that although for that reason the appellant ought not to be regarded as a decree-holder in the sense of s. 311, he may nevertheless have an interest in the property. He might perhaps be entitled to say that, although he had no right to share in the division of the assets, there would have been a surplus which would have been available for him, if the sale had been properly conducted, and so the question may still be open, whether he can come in as a person whose immoveable property has been sold. But we confess we are at a loss to perceive what the nature of his interest is. In the case relied upon, the consideration which lay at the root of the decision was that there had been a transfer to the mortgagee of an interest in the mortgaged property. Here there has been no transfer, nor is there, as indeed Mr. Hill has conceded, even a charge in favour of the appellant. But it was said that, inasmuch as the appellant is entitled to a benefit to arise out of land, in the sense that, having attached the property, he has a claim on the proceeds of the sale, he has an interest in the property which is itself immoveable property within the definition of the term contained in the General Clauses Act, and in support of this position reference was made to the judgment of certain of the learned Judges in *Paresh Nath Singha* v. *Nabo Gopal Chattopadhya* (2), who held that the interest of the mortgagee was immoveable property within the definition as being a benefit to arise out of land. The cases are not, however, in our opinion analogous, nor do we think that the definition of the General Clauses Act is sufficiently elastic to admit the particular species of benefit which Mr. Hill now seeks to bring within it.

We are, therefore, of opinion that the appellant was not entitled to apply under the provisions of s. 311 to have the sale now in question set aside, and that the appeal must, accordingly, be dismissed with costs.

The rule (No. 2531 of 1901) connected with this appeal need not be considered, and is discharged without costs.

Appeal dismissed.

(1) (1877) 1 C. L. R. 250.

(2) (1901) I. L. R. 29 Cal. 1.