

paragraph of the letter of the 10th June 1901, which appears to be consistent with his statement in cross-examination as to his intention at page 104, line 28 of the paper-book. There is no evidence of malice outside the language of the letter, nor is there any real ground for questioning the *bona fides* and honesty of the defendant Kar, who was writing under circumstances, of considerable provocation. Looking at those circumstances, and at the language used, and that that language may be fairly read as connected with the subject of dispute we do not think that, in themselves, the words afford evidence of express malice.

1904
JULY 22.
—
APPEAL
FROM
ORIGINAL
CIVIL.
—
32 C. 318-8
C. W. N. 731.

As regards the liability of the defendant Ghose he had nothing whatever to do with the transaction. The letter of the 2nd May, charging Kar with unprofessional conduct was addressed to the firm, and answered, consequently, in the name of the firm, and we think that the above considerations which apply to Mr. Kar, would apply equally to the case of Mr. Ghose.

The appeal must be dismissed with costs.

SALE, J. I agree.

BODILLY, J. I also agree.

Appeal dismissed.

Attorney for the appellant: *Hirendra Nath Dutt.*

Attorney for the respondents: *Opoorba Coomar Gangooly.*

32 C. 332.

[332] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Bodilly and Mr. Justice Mookerjee.

JOTINDRA MOHAN TAGORE v. MAHOMED BASIR CHOWDHRY.*
[20th July, 1904.]

Auction-purchaser—Auction sale, reversal of—Refund of purchase-money, suit for—Civil Procedure Code (Act XIV of 1882), s. 244.

The right of an auction-purchaser to a refund of the purchase-money where the auction-sale has been set aside for irregularity, is not a question arising between the parties to the suit or their representatives and relating to the decree, within the meaning of s. 244 (c) of the Civil Procedure Code: a separate suit for refund of such purchase-money is therefore maintainable.

[**Fol. 5 P. R. 1907=40 P. W. R. 1907=28 P. L. R. 1908; Ref. 10 C. W. N. 274; 39 I. C. 768=1 Pat. L. W. 551=2 Pat. L. J. 361.**]

APPEAL by Maharaja Bahadur Sir Jotindra Mohan Tagore, the defendant No. 1, under s. 15 of the Letters Patent.

The plaintiff had bought a mehal belonging to the defendants Nos. 2 to 6, which had been put up to auction in execution of a rent decree obtained by the first defendant against the other defendants, and had paid the purchase-money into Court in the ordinary course. Subsequently on the application of the judgment-debtors, the sale was set aside by the Sudder Munsif on the ground of irregularity under s. 311 of the Civil Procedure Code, and an appeal from this order, preferred by the plaintiff, was dismissed by the District Judge.

* Letters Patent Appeal No. 52 of 1903, in appeal from the Appellate, Decree No. 1312 of 1901.

1904
JULY 20.
—
APPELLATE
CIVIL.
—
32 C. 332.

The plaintiff then applied to the Munsif for a refund of the purchase-money paid by him, but his application was refused; and his appeal from this order was also dismissed by the District Judge on the ground that no appeal lay against such an order. He then instituted this suit for a declaration confirming his right by purchase to the property in the suit, and for confirmation of his [333] purchase at the auction, or in the alternative for a refund of the purchase-money with interest, and other reliefs.

The defendants pleaded, *inter alia*, that the suit was not maintainable, having regard to the provisions of s. 244 of the Civil Procedure Code.

The Court of First instance holding that the plaintiff was entitled to a refund of the purchase-money, made a decree against all the defendants. Against that decree separate appeals were preferred by the first defendant, the original decree-holder, and the defendants Nos. 2 to 6, the judgment-debtors; and the Subordinate Judge, on appeal, reversed the decree so far as it concerned the defendants 2 to 6, but dismissed the appeal of the defendant No. 1, who then preferred an appeal to the High Court.

The second appeal was heard by BANERJEE, J., sitting alone, and his Lordship delivered the following judgment:—

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff-respondent for refund of the purchase-money paid by him as auction-purchaser at a sale held in execution of a rent decree obtained by defendant No. 1 against the defendants Nos. 2 to 6 on the ground of the auction-sale having been reversed on the application of the judgment-debtor. The defence of the defendants, so far as it is necessary to consider it for the purposes of this appeal, was that the said suit was not maintainable, having regard to the provisions of section 244 of the Code of Civil Procedure.

The first Court found for the plaintiff and gave him a decree against all the defendants. Against that decree two separate appeals were preferred—one by defendant No. 1, the original decree-holder, and the other by defendants 2 to 6, the judgment-debtors; and the lower Appellate Court, whilst affirming the decree as against defendant No. 1, has reversed that decree so far as it concerns the defendants 2 to 6.

Against this decision of the lower Appellate Court, the present second appeal has been preferred by defendant No. 1, and it is urged on his behalf—*first*, that the Court of Appeal below was wrong in holding that the suit was maintainable when it ought to have held that the suit was barred by section 244 of the Code of Civil Procedure; and, *secondly*, that the Court of Appeal below was wrong in decreasing the claim against defendant No. 1 when it ought to have held that if the plaintiff was entitled to any decree, such decree should be passed against defendants Nos. 2 to 6.

In support of the first contention, the learned vakil for the appellant relies upon clause (c) of section 244, and contends that this case comes under that clause, the question of refund of purchase-money being a question under that section by reason of the auction sale having been reversed not on the ground of any irregularity and substantial injury under section 311, but on the ground of fraud, and therefore under [334] section 244. Granting that the reversal of the auction-sale was under section 244, it does not follow that a suit for refund of the purchase-money involves a question coming under that section. The question of the auction-purchaser's right to obtain refund of the purchase-money is not a question arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree. The matter relating to the execution, discharge or satisfaction of the decree came to an end with the order for reversal of the sale; and the claim for refund of the purchase-money did not arise until that matter was disposed of. It cannot therefore be rightly held to come under clause (c) of section 244 of the Code of Civil Procedure. The view I take is in accordance with that taken by this Court in the case of *Hari Doyal Singh Roy v. Sheekh Samsuddin* (1).

Then as to the second contention, I must say that the view taken by the lower Appellate Court is correct. The argument in support of the appellant is this, that as the receipt of the purchase-money by the appellant has really been for the benefit of the judgment-debtor, whose judgment-debt has been satisfied to the extent of this

(1) (1900) 5 C. W. N. 240.

money, the party who should be held liable to make the refund ought to be the judgment-debtor. One answer to this contention would be this:—That if this was the right view of the matter it would clash with the provision made by the Legislature in section 315 of the Code of Civil Procedure which directs that in the event of a sale of immovable property being set aside under section 312 or 313 of the Code of Civil Procedure, 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.” This section contemplates the possibility of the purchase-money having been paid to the decree-holder, and yet it provides that the refund in the event of the sale being set aside should be made by the party to whom the money has been paid. It ought not to make any difference if the sale has been set aside not for any of the grounds mentioned, or referred to, in section 315, but for a worse reason, that is, owing to the sale having been vitiated by fraud on the part of the decree-holder’s agents, nor does it make any difference if the decree is now barred and the decree-holder is unable to enforce it as against the judgment-debtors, when the judgment-debtors did nothing to bring about the difficulty in which the decree-holder may now find himself. That being so, the contentions urged before me fail, and this appeal must be dismissed with costs.

The defendant then appealed under s. 15 of the Letters Patent.

Babu *Shib Chunder Palit*, for the appellant.

Babu *Bipin Behury Ghose*, for the respondents.

[335] MACLEAN, C. J. I think the view taken by the learned Judge in the Court below is quite right. There are many difficulties in the path of the appellant. I do not think the case falls within section 244, Code of Civil Procedure. It is not, to my mind, a question between the parties to the suit or their representatives and relating to the execution of the decree. But even if it were the suit may be taken as one instituted in a Court which had jurisdiction to execute the decree, and the plaint may be regarded as an application to the Court for determining the question raised in the litigation, *viz.*, whether the purchaser was entitled to a refund of the money from the decree-holder to whom the money had been paid. The appeal is dismissed with costs.

BODILLY AND MOOKERJEE, JJ., concurred.

Appeal dismissed.

32 C. 336 (=9 C. W. N. 610=1 C. L. J. 134.)

[336] CIVIL RULE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

GHANESHYAM MISSER v. PADMANAND SINGH.*
[14th March, 1903.]

Record of rights—Bengal Tenancy Act (VIII of 1885), ss. 107, 109—Undisputed entry—Presumption of accuracy how rebutted.

The presumption under s. 109 of the Bengal Tenancy Act (VIII of 1885) in favour of the accuracy of an undisputed entry as to the rate of rent is sufficiently rebutted by the decree in a contested suit *inter partes* showing a different rate.

Section 109 of the Bengal Tenancy Act lays down a rule of evidence; it does not override the rules of *res judicata* which are of general application.

[Diss. 5 C. L. J. 92; (Res judicata—Rate of rent); Ref. 7 C. L. J. 512; 11 C. W. N. 158 (Suit by co-sharer for fractional share of rent).]

RULE granted to Ganeshyam Misser, the defendant-respondent.

*Civil Rule No. 2876 of 1902, in Second Appeal No. 1188 of 1898.

1904
JULY 30.
—
APPELLATE
CIVIL.
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32 C. 332.