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"on oath before this Court, and which with the plaintiff's statement formed "the grounds from which to frame issues, raised any objection as to the rates "so that it is necessary now to return this case for trial on this point" The lower Appellate Court then concludes its judgment by dismissing the appeal with costs.

The defendant appeals specially.

The fifth and the last ground is that the provisions of Act X of 1859 have reference only to lands held for agricultural and horticultural purposes, and not to lands on which actual dwelling-houses are erected, and held by persons other than actual cultivators.

In regard to the last plea that this being a case for lands for building purposes, the provisions of Act X. of 1859 do not apply. *Kali Mohan Chatterjee* v. *Kali Krishna RoyChowdhry* (1) has been cited. But the facts of that case were totally different from the facts in this. There the building was part of a range of buildings in the centre of the town, and therefore the rent of those houses, would not fall within the purview of Act X. of 1859.

It is to be here also noticed that part of the land occupied by defendant was not occupied by the house, and besides this the point was not taken in either of the Courts below.

On the whole I see no error in law in the judgment of the lower Appellate Court, and I would therefore dismiss this appeal with costs.

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July 19.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

SHEIKH GOLAM YABEYA (DECREE-HOLDER) v. MUSSAMUT SHAMA SUNDARI KUARI (JUDGMENT-DEBTOR.)*

Execution—Striking off Case—Release from Attachment.

The striking off of a case from the file, while pending in execution, do not release a property from attachment.

Mr. *R. E. Twidale* for appellant.

Baboo *Kali Krishna Sein* for respondent.

The facts are fully stated in the judgment of

NORMAN, J.—The plaintiff in this case is a decree-holder, who had attached a certain property belonging to the judgment-debtor, called Rasulpore. By

* Miscellaneous Special Appeals, Nos. 206 and 207 of 1869, from an order of the Judge of Bhagulpore, dated the 22nd February 1869, affirming an order of the Moonsiff of that district, dated the 5th June 1868.

(1) 2 B. L. R., App., 39.

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petition, dated the 3rd June 1863, he applied to the Court for an order for the sale of the property by auction, under section 249 of Act VIII. of 1859.

The Moonsiff refused the application on the ground that "the execution case had been struck off on the 26th September 1866;" that the attachment being prior to that date had ceased to have any effect; and that an order for a sale by auction could not be made except on a fresh attachment. The Moonsiff, accordingly, rejected the petition, and directed the petitioner to take out a fresh attachment.

The judgment creditor appealed to the Judge, who held that the decree under which the decree-holder was proceeding was invalid, and therefore dismissed the appeal. From these decisions the decree-holder appeals to this Court.

The facts of the case are briefly as follows:

The plaintiff obtained an *ex parte* decree on the 22nd September 1864 for rupees 545. He applied for execution of his decree by the attachment of talook Rasulpore, and obtained an order for that purpose in December 1864. For the present, we must assume that the order for attachment was duly made known as required by section 239. Upon that order, under circumstances of which at present we know nothing, no further proceedings to bring the property to sale took place till the 12th of May 1866. On that day, the defendant presented a petition under section 119, alleging that he had not received any notice of the proceedings, and praying for an order to set aside the judgment against him. On the 21st June 1866, his petition was rejected by the Moonsiff. From that decision, the defendant appealed to the Judge. On the 20th August 1866, the Judge reversed the Moonsiff's order, and remanded the case for trial.

The Moonsiff, by a *rubakari* stating that the orginal decree, execution of which had been sought, had been set aside by the order of the Judge, and that the case had been remanded for trial, ordered that, therefore, the case in execution of that decree must be struck off; and, accordingly, the execution case was then and there struck off the file of the Moonsiff.

The plaintiff appealed from the decision of the Judge to the High Court, and on the 11th of April 1867, the High Court decided that, under section 119 Act VIII. of 1859, the defendant should have come in within thirty days from the time when the first process for enforcing the judgment of the Court had been executed; and setting aside the Judge's order, remanded the case to the Judge, to try on what date the first process for enforcing the judgment of the Court was executed.

On the 1st February 1868, the Judge took up the case. He found that the defendant had not come in within thirty days after such first process had been executed; and he, accordingly, held that the defendant could not come in under section 119, thus leaving the orginal *ex parte* judgment of the Moonsiff from that date in full force and effect. On the 25th March 1868, the plaintiff applied for an order for the sale of the property, and after some other intermediate applications, came that of the 3rd of June, to which I have already alluded

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I think that I must assume that, on the 12th of May 1866, when the defendant first applied to the Moonsiff to set aside the *ex parte* decree, there was a valid attachment upon which the plaintiff was entitled to proceed to obtain an order for the sale of the property under section 249. It appears to me plain that the defendant could not, by proceedings which were irregular and afterwards set aside, remove the plaintiff from the advantageous position in which he stood on that day. The order of the 20th of August 1866, reversing the Moonsiff's decision, has been set aside, and the case must be treated as if no such order had ever existed. The order for the removal of the case from the files of the Court by the Moonsiff was passed while the order of the Judge was in force; and when the Judge's order was afterwards set aside in pursuance of the decision of the High Court, after the finding on the facts to which the Judge came on the 3rd of February 1868, it became the duty of the Moonsiff to allow the execution to proceed in the ordinary course. The order which had been set aside, and the striking off the case, an act merely done to give effect to the invalid order, could not affect the legal position and rights of the plaintiff. The Moonsiff should, when the decree-holder applied for an order for sale, have at once restored the case to the file, if restoration to the file was necessary.

I myself entertain a strong opinion that whether the case was formally restored to the file or not, the order for atttachment made under section 235, prohibiting the defendant by a written order from alienating the property by sale, gift, or in any other way, and all other persons from receiving the property by purchase, gift, or otherwise, was in full force and effect in May 1868. No doubt, while the decision of the 20th of August 1866 stood, the decree on which the order for attachment was based having fallen to the ground, the order itself was inoperative. But when the Judge's decision was reversed, the orginal *ex parte* decree with all proceedings held thereon, including of course the order for attachment was at once revived.

I think that, except possibly as regards third persons who may have acquired rights during the time when the Judge's order was in force, or who may be able to show that the decree-holder has abandoned any of his rights, or lost them by laches, the order for attachment must be deemed and taken to have full effect and operation from December 1864, or at any rate from the date when such order was duly notified. If then, the force and effect of the attachment revived on the 3rd of February 1868, from that time it became unnecessary that the plaintiff should obtain any fresh order for attachment before proceeding to the sale of the property.

I entirely agree with what the Chief Justice says in the case of *Mussamut Zahurun* v. *Tayler* (1): "I know no authority in Act VIII. for saying that an attachment is at an end, because the execution suit is struck of the file." Mr. Justice Loch and myself decided a case, *Gunno Sing* v. *Baboo Muddun*

(1) 2 B. L. R., A. C., 86.

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Mohun Sing (1), in accordance with this opinion, on the 27th of January 1864.

I am not aware that there is any decision that conflicts with the decision that we now pronounce. His Lordship referred to the cases of *Baboo Luchmeeput* v. *Baboo Leckraj Roy* (2), *Khadem Hossein Khan* v. *Kalee Persad Sing* (3), *Musst Janee Khanum* v. *Musst Amatool Fatima Khanum* (4), and *Purbhoo Doss* v. *Goma Bhunjun Sing* (5). I do not think that our decision is in conflict with any one of these cases. If it were, I should have thought it necessary to refer the matter to a Full Bench. We follow the decision of the 27th January 1864, *Gunno Sing* v. *Baboo Muddun Mohun Sing* (1), and our decision is in accordance with the case of *Raja Mohesh Narain Sing* v. *Kishnanund Misser and Rughoobur Dyal Sing* (6).

The case must go back to the first Court, and the Moonsiff will order the sale to proceed, unless it is shewn that there is some objection arising from the delay between December 1864 and May 1866, of which at present we know nothing.

JACKSON, J.—I concur in the decision pronounced by Mr. Justice NORMAN. It has reference solely and specially to the objections which have been urged before us by the judgment-creditor to the sale of the property upon the attachment of which it has already taken place. The question is, whether the order of the 20th September 1866, striking the execution case off the file did not become altogether null and void when the order of the Judge of the 26th of August 1866, on which that order was founded, was afterwards reversed by the decision of the 3rd February 1868, and when the judgment-creditor, without any delay, at once asked that the execution case might be carried on.

I think that, under the circumstances, the Court was able to revive the execution, and to continue the proceedings as if the orders of the 26th September had never been passed.

I give no opinion as to what would have been the case had the judgment-creditor delayed to revive and carry on the execution proceedings. But I see no reason, as the case stands at present, why, if the judgment-creditor wishes to act on the attachment of December 1864, he may not act on it. The judgment-debtor has, as far as I can see, shown no sufficient cause against his doing so.

It is impossible to say what may be the effect if other parties have acquired rights in the meantime. That is a question to be decided between the judgment-creditor and those parties, when it arises.

The case will be remanded to the first Court

(1) W. R., 1864, 26.
(2) 8 W. R., 415.
(3) 8 W. R., 49,
(4) 8 W. R., 51.
(5) 5 W. R., Mis., 4
(6) 9 Moore's I. App., 324.