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purchaser should not have taken into his possession the elephant, though he might use it for four days in a month. In this case the purchaser purchasing only the right of the judgment-debtor, took possession of the elephant on his own risk. For this wrongful conversion of the property, he has been justly held liable. The decision in *Tamizuddin Mulla* v. *Nyanutulla Sirkar* (1) was in point. The purchaser, and not the decree-holder, was held liable for damages.

Baboo *Girishchandra Ghose* in reply.

The judgment of the Court was delivered by

MITTER, J.—The only question raised in this special appeal is whether a remedy lies against the auction-purchaser, firstly, according to the term of the Circular Order of the Sudder Court dated June 10th, 1842, and secondly, because the purchaser is informed by the terms of the sale proclamation that the sale extends only to the right, title, and interest of the debtor, and he ought, therefore, to take pains to inform himself before hand of the validity thereof. I think the maxim *caveat emptor* would be entirely applicable to such a case. The Circular Order of June 10th, 1842, directs that where a claim has been made, notice of such claim should be given to the public at the time of sale. Owing to an oversight, no such notice was given in the present case; but I think the notification that the sale extended only to the title of the judgment-debtor sufficient to put a purchaser on his guard. I have dismissed this case against the defendant contingent on the opinion of the High Court.

PEACOCK, C. J.—The Judge should not state an A. B. case, he should give the names. The Judge was right in holding that the execution-creditor was not liable. The purchaser would become entitled to an undivided share of the chattel, to be used by him as the owner of an undivided share. He would have the same right as the judgment-debtor and would not be liable to the owner of the other undivided share merely for using it, nor unless he converted it to his own use.

(1) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

TAMIZUDDIN MULLA *v.* NYANUTULLA SIRKAR.*

May 22nd, 1869.

THE following case was referred by the Officiating Judge of Krishnaghur.

"The defendant, in execution of a decree against A., seized certain moveable property which was claimed, under section 246 of the Code of Civil Procedure, by B. An investigation was held under that section, and it was found that B. was part owner of the property. His claim was rejected and the sale proceeded, the moveable property sold being made over manually to the auction-purchaser, and the whole of the proceeds handed to the defendant (the judgment-creditor) in liquidation of his decree. The sale proclamation declared that the sale extended only to the right, title, and interest of the debtor, but there was no mention made of B.'s claim. The latter now brings a regular suit for damages against the defendant for the loss sustained by the sale of the property of which he was a joint owner. The question, and which I solicit the opinion of the High Court, is whether the defendant is liable, or should the suit be brought against the auction purchaser?" The Judge referred to *Misree Begum* v. *Punnoo Singh* (2), and continued, "I am unable to find any ruling in point, but am of opinion that the

* Reference by the Officiating Judge of the Small Cause Court at Kishnaghur, dated March 2nd, 1869.

(2) 8 W. R., 362.

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decree-holder who has caused the sale of moveable property, not belonging to his debtor, is liable to make good the value of that property to its rightful owner, supposing that he (the decree-holder) has acted in perfect good faith.

I am of opinion that this question ought to be answered in the affirmative.

Whether the decree-holder has acted in good faith or not, does not seem to me to be of much importance one way or the other. It is beyond all question that a decree-holder has no right to seize a property which does not belong to his debtor, and he is therefore bound to satisfy himself beyond the possibility of a mistake that the property against which he intends to execute his decree is really the property of his debtor. No mistake on this point, however innocently committed, can relieve him from the consequences of his own act, which is certainly an act of trespass so far as the rightful owner is concerned, and I see no reason in justice or equity why the latter should suffer in consequence of such a mistake. It has been said that the rightful owner may follow the property in the hands of the purchaser who purchased it at his own risk and peril. But there is no law that I am aware of which says that this is the only remedy of the rightful owner. Suppose, for instance, that the purchaser is an insolvent, or that he is beyond the reach of the Court's process, or that the rightful owner is unable to find him out. Is the rightful owner to pocket the loss, because the decree-holder has acted under a mistake? I see no reason whatever for acceding to such a contention.

Much stress has been laid by the pleader for the respondent upon two decisions of this Court: the one in *Mohanund Holdar* v. *Akial Mehaldar* (1); the other in *Tamizuddin Mulla* v. *Nyanutulla Sirkar* (2). But neither of these two cases appears to me to have any bearing upon the point now under our consideration. All that was decided in the first case was that the owner of moveable property sold in execution of a decree, is at liberty to follow that property in the hands of the purchaser; but no question relating to the liability of the decree-holder seems to have been raised or discussed before the learned Judges by whom that decision was passed. In the second case, it was found, as a fact, that the judgment-debtor had a moiety or half share in the property seized by the decree-holder; so that, if anybody was to blame, it was the auction-purchaser who had taken possession of the entire property, notwithstanding that he was entitled to one-half of it only as the purchaser of the right, title, and interest of the judgment-debtor. There is one case, however, *Mussamut Subjan Bibi* v. *Sheikh Sariatulla* (3), which dirdctly supports my view.

For the above reasons, I would reverse the decision of the Judge, and restore that of the Court of first instance. The costs of this Court and of the lower Appellate Court ought to be borne by the decree-holder, respondent.

(1) 9 W. R., 118. (2) *Ante*, p. 73. (3) 3 B. L, R., A. C., 413.

Before Mr. Justice Bayley and Mr. Justice Markby.

IN THE MATTER OF THE PETITION OF SHEIKH ILAHI BAX AND OTHERS (PETITIONERS).* 1870 *June 7.*

Appeal—Act VIII of 1859, *ss.* 324., 325—*Award.*

Two, out of three arbitrators appointed in the case, submitted their award before the Moonsiff. The defendant against whom the award had been made applied to the Moonsiff to set aside the award, on the grounds of corruption and misconduct, and that the award was a nullity, inasmuch as only two out of three arbitrators had made the award. The Moonsiff overruled the objections and passed a decree in terms of the award. On appeal to the Judge, the order of the Moonsiff was set aside, on the ground that the award, was illegal, as two only of the three arbitrators originally appointed had made the award, and that the evidence did not prove the plaintiff's case.

On an application to the High Court to set aside the order of the Judge, *held*, that under section 325, Act VIII of 1859, the Judge had no jurisdiction to set aside the award when the Court of first instance had passed judgment according to the award.

SHEIKH ILAHI BAX and others petitioned the High Court as follows:—

"That your petitioners instituted a suit in the Court of the Moonsiff of Amdohora, in the district of Beerbhoom, for recovery of a certain quantity of paddy, or damages in equivalent thereof, against Sheikh Hafu and Sheikh Sumid, defendants.

"That, after some evidence had been gone into on the part of your petitioners, the matter in difference between the parties was referred to the arbitration of three individuals, named Umesh Chandra Chatterjee, Shibu Prasad Acharji, and Shastidhur Mandal, upon an agreement signed by both the parties. The material portion of the agreement is:—'Of the three arbitrators, the decision of the majority shall be binding; if any arbitrator shall "'refuse or be incapable to act, then the decision come to by the other "'arbitrators, with the aid of any umpire they may appoint with the concur-"'rence of both the parties, shall be equally binding; and if there be any "'difference of opinion betweenthe two arbitrators.then the award of the ar-"'bitrator who is supported by the umpire shall prevail and be binding.'

"That the three arbitrators aforesaid repaired to the *locale* and examined three witnesses in the presence of both the parties. The arbitrator, Shastidhur Mandal, never again appeared to make the investigation referred to. The other arbitrators made a reference to the Court, on account of the absence of the said Shastidhur Mandal; and, under the orders of the Court, caused notices to be served on the said Shastidhur Mandal, and the parties to the suit for their appear-

* Rule *Nisi* or Motion, No. 406 of 1870, from an order of the Judge of Beerbhoom, dated the 10th March 1870.

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IN THE MATTER OF THE PETTION OF SHEIKH ILAHI BAX.

ance. Shastidhur did not appear; but on the appearance of the parties they were told by the two arbitrators to produce their witnesses on a certain day. The plaintiffs appeared on the fixed day with their witnesses, but the defendants or their witnesses did not appear. Upon this the two arbitrators made a reference to the Court to know whether they should proceed with the case under the circumstances, and the Court ordered them to proceed with the case; and if the defendants did not appear, to make their award on *ex parte* investigation; the defendants at the same time applied to the Court to supersede the arbitration, and recall the suit, on the ground of corruption and misconduct of the arbitrators, but their application was rejected. The two arbitrators then investigated the case *ex parte*, and submitted an award, which was partially favorable to the plaintiffs.

"That, upon the submission of this award, the defendants put in a petition to the Court, praying that the award be set aside, on the ground of corruption and misconduct of the arbitrators, and of one of the arbitrators having been absent; the Court took evidence on the part of the defendants to consider the charge of corruption and misconduct, and then finding the charge unsubstantiated, gave its judgment according to the award.

"That the defendants appealed against this judgment of the Moonsiff to the Judge of the district, and the Judge held that the award was illegal, as two out of the three arbitrators originally appointed only made the award; and pon a consideration of the plaintiffs' evidence in the record, found plaintiffs claim, as laid in the plaint, not satisfactorily proved; and he therefore reversed the judgmeut of the Moonsiff by a jndgment dated the 10th March 1870."

And the petitioners submitted—

"1. That the Judge had no jurisdiction to entertain the appeals as, under section 325 of Act VIII of 1859, the judgment of the Moonsiff was final.

"2. Assuming that the Judge had jurisdiction in the matter, he could not set aside the award, as it was not, in fact, made without jurisdiction, and he had no jurisdiction to decide the merits of the case upon the evidence in the record, and reverse the judgment of the Moonsiff."

A rule *nisi* was thereupon issued calling upon the defendants to shew cause, within fifteen days of service, why the order of the Judge of Beerbhoom, dated the 10th March 1870, should not be set aside, and the judgment of the Moonsiff restored.

Baboo *Mohini Mohan Roy* shewed cause and contended that there was no award, as only two out of the three arbitrators had attended and made the return, and therefore the Moonsiff's judgment was not a judgment according to the award within the meaning of section 325, Act VIII of 1859. He cited *Sreenath Ghose* v. *Rajchunder Paul* (1).

(1) 8 W. R., 171.

Baboo *Debender Chandra Ghose*, in support of the rule, cited *Pareshnath Dey* v. *Nabin Chandra Dutt* (1).

(1) *Before Mr. Justice Glover and Mr. Justice Mitter.*

PARESHNATH DEY AND ANOTHER (DEFENDANTS) *v.* NABIN CHANDRA DUTT (RESPONDENT).*

June 28th, 1869.

MITTER, J.—We are of opinion that the decision of the lower Appellate Court ought to be reversed. The Moonsiff who tried this suit in the first instance, referred it to arbitration, under the provisions of section 315, Act VIII of 1859. The arbitrators came to the conclusion that the transaction relied upon by the plaintiff was altogether fictitious, but they nevertheless held that the plaintiff was entitled to a decree, inasmuch as the defendant had affixed his signature to the *bina-putra* upon which the suit was brought.

The Moonsiff declined to uphold this award, upon the ground that the arbitrators were guilty of misconduct, in deciding contrary to the evidence which they themselves had accepted and believed.

On appeal, the Judge has reversed the Moonsiff's decision, holding that the Moonsiff had no jurisdiction to refer to the evidence taken by the arbitrators for the purpose of determining whether they were guilty of misconduct or not.

It has been contended before us that the Judge having disposed of the case according to the award of the arbitrators, the decision is final, under the provisions of section 325 of the Code. But we are clearly of opinion that this contention is not sound. The provisions of section 325 apply to that Court only, by which the case is referred to arbitration, and to no other Court. In the present case, the Court which made the reference declined to pass judgment according to the award, and the Judge, having on appeal, reversed the decision of that Court, we have every power to see whether the Judge's decision is correct or otherwise. There is nothing in the provision of section 325 which goes to show that those provisions were intended by the Legislature to be applicable to a case like the present, and we are bound to entertain this special appeal; there being no express provision to the contrary.

Upon the merits, we are of opinion that the Judge's decision is wrong. The Moonsiff had every power to refer to the whole of the arbitration record, for the purpose of determining whether the arbitrators were guilty of misconduct or not. Section 320 says:—"When an "award in a suit shall be made either "by the arbitrator or arbitrators, or by "the umpire, it shall be submitted to "the Court under the signature of the "person or persons by whom it is made "together with all the proceedings, de "positions, and exhibits in the suit." If, therefore, the arbitrators are bound to submit to the Court, all the proceedings, depositions, and exhibits in the suit, the Court to which they are submitted has every power to look into them; and if on the perusal of those proceedings, depositions, and exhibits, the Court is satisfied that the award is of such a perverse character as to raise a reasonable presumption of misconduct on the part of the arbitrators, it has every power to set it aside.

Charges like partiality and misconduct, are seldom capable of direct proof; and if the proceedings of the arbitrators which contain the best available evidence of their conduct are not referred to for the purpose of determining whether that conduct was good or bad, gross failure of justice might ensue in many cases. In the present case, there can be no doubt that the award of the arbitrators is highly improper on the very face of it, and the Moonsiff was fully justified in holding them guilty of misconduct, in having decided the case contrary to all the evidence which they had themselves recorded and believed.

We reverse the decision of the Judge, and restore that of the Moonsiff, with the costs of this Court and of the lower Appellate Court.

* Special Appeal, No. 3217 of 1868 from a decision of the Officiating Additional Judge of Jessore, dated the 3rd September 1868.