

The judgment of the Court was delivered by

JACKSON, J.—It seems to me quite clear that pleaders are empowered by Act XVIII of 1865 to appear, plead, and act in the criminal Courts, and they may so plead and act as well on behalf of prosecutors as on behalf of accused persons.

Section 419 of the Code of Criminal Procedure expressly recognised the right of the counsel or agent of the complainant to be heard upon appeal. We can see no reason for supposing that the right varies in the case of appeals from what it is in the case of proceedings in the Court of the Magistrate. Section 432, Act VIII of 1869, in my opinion, is merely intended to limit the right of an accused to be defended by a barrister or attorney of the High Court, or pleader, or otherwise by other persons with the leave of the Court.

We think, therefore, that the order of the Deputy Magistrate ruling that a pleader was not entitled to appear on behalf of a private prosecutor is erroneous, and ought to be set aside (1).

1870

IN THE
MATTER OF
CHANDI
CHARAN
CHATTERJEE
v.
CHANDRA
KUMAR
(HOSE).

Before Mr. Justice Loch and Mr. Justice Mitter.

KANAI PRASAD BOSE AND ANOTHER (PLAINTIFFS) v. HIRACHAND
MANU (ONE OF THE DEFENDANTS.)*

Execution—Attachment and Sale of Moveable Property—Decree-holder, Liability of, to Owner of Property wrongly seized and sold by him.

1870
July 12.

In execution of a decree against a judgment-debtor, his right, title, and interest in an elephant was sold. In a suit by a third party against the decree-holder and the purchaser for recovery of the elephant or its value, on the ground that the elephant was his property, and not the property of the judgment-debtor.

Held, that the decree-holder, as well as the purchaser, was liable to make good the loss caused by such sale.

THIS was a suit for recovery of an elephant valued at rupees 1,500. The plaintiffs, had purchased the indigo concern at Kishoreganj, which formerly belonged to Messrs. Perroux and Company, partly by private sale, and partly at auction, and they accordingly had come to possession thereof along with the elephant in dispute, which appertained to the concern. The defendant, Hirachand, who held a decree against Messrs. Perroux and Company subsequently caused the elephant in dispute to be seized and sold in execution thereof. Hence the present suit to recover the said elephant or its value.

Hirachand's defence was that the elephant belonged to Messrs. Perroux and Company, and did not pass with the indigo concern to the plaintiffs.

(1) See also Act XXV of 1861, sec. 376.— question put to him by the Court, the prosecutor or the Counsel or Agent for the accused person, or if he answers any prosecution shall be entitled to a reply."

* Special Appeal, No. 526 of 1870, from a decree of the Judge of Rungpore, dated the 18th December 1869, modifying a decree of the Subordinate Judge of that district, dated the 4th December 1868.

1870

KANAI PRASAD
BOSE
v.
HIRACHAND
MANU.

The defendant, Beharilal, who had purchased the elephant at the auction sale, set up that the sale had become valid, as he had paid for, and received delivery of, the property.

The Subordinate Judge found that the plaintiffs were the owners of the elephant in dispute, and citing *Mohanund Holder v. Akial Mehalidar* (1), held that they were entitled to recover the value thereof from the decree-holder and the purchaser.

On appeal, the Judge found that there was no charge of fraud against Hirachand, the decree-holder; that the purchase had been made by the plaintiffs' servant, who afterwards sold the elephant to the plaintiffs' father; and that there was no evidence to shew that the plaintiffs had sustained any loss. He accordingly reversed the decree of the lower Court, and dismissed the suit as against the defendant Hirachand.

The plaintiffs appealed to the High Court.

Baboo *Girishchandra Ghose*, for the appellants, contended that, irrespective of any question of fraud, there was a trespass committed by the defendant on the property of the plaintiff whereby he had sustained a loss. The defendant is bound to make good any damage which results from his acts—*Mussamat Subjan Bibi v. Sheikh Sariatulla* (2) was in point.

Baboo *Ramchandra Mitter* (Baboo *Anukulchandra Mookerjee* with him), for the respondent, contended that the decree-holder was not liable for damages on account of the sale of the elephant. He had sold nothing belonging to the plaintiffs. All that he had sold was the right, title, and interest of his debtor in the elephant. *Vide* section 249 of the Civil Procedure Code, and the case of *Mohanund Holder v. Akial Mehalidar* (1). Section 252, Act VIII of 1859, indeed says that the sale of immoveable property after delivery of the price thereof should be held absolute. But if the sale did not, under section 249 of the Procedure Code, extend beyond the right, title, and interest of the debtor nothing more could be held to have passed absolutely. The decree holder thus was not to blame for any inconvenience that the plaintiffs might have suffered by any act over which he could have no control. There was no allegation of fraud or *mala fides*. He sold his debtor's property—the right, title, and interest of his debtor in the elephant, for the liquidation of his debt. Under these considerations the decree-holder ought not to be held liable. The purchaser was liable for the damages on account of the value of the elephant. The purchaser ought to have enquired before purchase what the right, title, and interest of the debtor was in the elephant, and ought to have taken possession of the property, or dealt with it, according to the nature of that title. Thus, if he found that the elephant was to be in the possession of a third party, and that the judgment-debtor could use it only for four days in a month, the

(1) 9 W. R., 118.

(2) 3 B. J. R., A. C., 413.

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. Nyantulla 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

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

TAMIZUDDIN MULLA v. NYANTULLA 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 movable 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

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.

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