from a Hindu widow know, or ought to know, by this time, the extreme risk of such a transaction ; and if they choose to run it, and to buy without consulting the next heirs, or without taking such further steps as would enable them at some future time, should necessity arise, to prove that they made diligent and careful enquiry as to the existence of a legal necessity before buying, they must take the consequences. The defendant here is rather in a worse position, as he is a purchaser from the original buyer. However, if he considers that there is sufficient evidence in the record to enable the Subordinate Judge to decide that there was no income from Muddun Mohun's estate, and that the only way for the widow to perform the Gya *sradh* was to sell the land, he is entitled to ask for a remand for the purpose of supplying the omission.

If the Subordinate Judge considers that, in respect of any of the three plots there is evidence sufficient, he will dismiss the plaintiff's claim, so far it being I consider a reasonable necessity according to Hindu law that a widow should perform her husband's Gya *sradh* if circumstances render it practicable, and that she may for this purpose alienate at least a portion of his estate.

Costs will follow the result.

*Case remanded.*

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*Before Sir Richard Couch, Kt., Chief Justice. Mr. Justice Phear, and Mr. Justice Ainslie.*

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*March.* 21.

BISSESSUR LALL SAHOO AND ANOTHER (PLAINTIFFS) *v.* RAM TUHUL SINGH AND OTHERS (DEFENDANTS).*

*Execution of Decree—Revenue Sale set aside—Refund of Purchase-money.*

See also 15 B L R 209
1 L R 1 Cal. 55.

In execution of a decree, *A* the decree-holder caused the right, title, and interest of B, the judgment-debtor, in certain surplus proceeds of revenue sale then in the hands of the Collector to be sold, and *C* became the purchaser thereof. On confirmation of the judicial sale, *A* took out from the Court a portion of the amount paid by *C*, in satisfaction of his decree. The balance was taken out by other decree-holders in satisfaction of their decrees against B. *B* instituted a suit for,

* Regular Appeal, No. 189, from a decree of the Subordinate Judge of Tirhoot, dated the 27th May 1872.

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and obtained a decree, setting aside the revenue sale. *C* applied to the Collector for payment to him of the surplus proceeds of the revenue sale, but was refused on the ground that the sale had been set aside. In a suit brought by *C* against *A* and *B* for recovery of the amount paid by him for the purchase of the surplus proceeds of the revenue sale;

*Held* that B was liable to refund the amount and interest.

*Soudamini Chowdrain* v. *Krishna Kishor Poddar* (1) distinguished.

SHEWPERSAUD Sookul, a decree-holder, in order to realize the amount due under his decree from Ramtuhul Singh, one of the registered proprietors of Mehal Muleck, Alipore, Boozurg, in Pergunnah Balaguch, caused the right, title, and interest of the judgment-debtor in the surplus proceeds of sale of the said mehal (which had been sold for arrears of revenue), *viz.*, Rs. 1,39,693, held in deposit by the Collector in names of the said Ramtuhul Singh and his co-sharers, to be attached and sold on the 18th February 1868. Baboo Bissessur Lall Sahoo and Sodisht Lall Sahoo purchased the same in the name of Juldhari Pandah for Rs. 8,000. After confirmation of the sale, a certificate of sale was with the consent of Juldhari granted to Bissessur Lall Sahoo and Sodisht Lall. Out of the Rs. 8,000 paid into Court by the purchasers, a sum of Rs. 4,970-9-3½ was drawn out by Shewpersaud Sookul on account of the amount due under the decree for which the sale was effected; another sum of Rs. 407-7-9 was taken by him on account of money due under another decree, and the remainder by other parties who held decrees against Ramtuhul in satisfaction of their respective decrees. Bissessur Lall and Soodisht Lall applied to the Collector to make over to them the sum of Rs. 35,520-14, the share of Ramtuhul out of the deposit in the Collectorate. The Collector rejected the application on the ground that the revenue sale of the mehal had been set aside by the High Court. That decision of the High Court is now under appeal to the Privy Council.

Bissessur Lall Sahoo and Soodisht Lall brought the present suit against Ramtuhul Singh, the judgment-debtor, Baijnath Sookul, the representative of Shewpersaud Sookul, the decree-holder, at whose instance the property was sold, and Ram

(1) 4 B. L. R., F. B., 11.

Bhurose Singh, Bhoopnarain Singh and others, who in execution of their respective decrees, took out a portion of the consideration-money paid by the plaintiffs, for recovery of the amount paid by them for the purchase of the right, title, and interest of the defendant, Ramtuhul Singh, in the surplus proceeds of the revenue sale of Mehal Mulleck, Alipore, Boozurg, with interest on the ground that at the time of sale, the defendant, Ramtuhul, had a right to the surplus proceeds of the revenue sale, and that as the debt of the judgment-debtor had been satisfied with the amount paid by the plaintiffs, they were entitled to recover the amount with interest.

The defendant, Ramtuhul Singh, set up (*inter alia*) in his written statement that he had not acquiesced in the sale for arrears of revenue; that that sale had been set aside by the High Court; that he had no right or interest in the proceeds of that sale; that he did not receive any sum from out of the amount paid by the plaintiffs for the purchase of the surplus proceeds of the revenue sale; and that he was not liable to re-pay the amount to the plaintiffs.

The defendant, Baijnath Sookul, set up in his written statement that the suit was multifarious; that as the sale at which the plaintiffs became purchasers had not been set aside, they were not entitled to recover back the amount paid by them; that he had in good faith caused the surplus proceeds of the revenue sale to be sold; and that, as the plaintiff did not allege any fraud or dishonesty on his part, they were not entitled to recover their purchase-money from him.

The other defendants set up in their respective written statements that they were not liable to pay back the portion of the amount taken out by them from the Court.

The Subordinate Judge held that the suit was not multifarious; that there should have been no sale of the right, title, and interest of Ramtuhul in the surplus proceeds of the revenue sale under s. 242, Act VIII of 1859, but the amount in deposit in the Collectorate should have been ordered to be paid to the judgment-creditor (if there was no other objection to such payment); that what was sold could not be ascertained, as there was an appeal to the Privy Council from the decree of the High Court

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which set aside the revenue sale; that the judgment-debtor Ramtuhul, was not bound to indemnify the plaintiffs for the loss incurred by them—and, citing *Sheikh Mahomed Basirulla* v. *Sheikh Abdullah* (1), dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Mr. *Evans* (Baboos *Unnodapersaud Banerjee* and *Mohes Chunder Chowdry* with him) for the appellants.

The *Advocate-General* offg. (Mr. *Paul*) (Messrs. *Chauntrell, Knowles,* and *Roberts* with him) for the respondent Ramtuhul Singh.

Baboos *Chunder Madhub Ghose* and *Abinash Chunder Banerjee* for the respondent Baijnath Sookul.

Mr. *Evans* for the appellants contended that the plaintiffs were entitled to a refund of the purchase-money— *Bank of Hindustan, China, and Japan* v. *Premchand Rai Chand* (2). *Sowdamini Chowdrain* v. *Krishna Kishor Poddar* (3) was not applicable to the present case, as the sale of the money was *ultra vires*. The law (s. 242, Act VIII of 1859) prevents the sale of money in execution of a decree, and prescribes the mode in which it is to be dealt with, towards satisfaction of the decree. The judgment-debtor, having illegally brought to sale property which was not liable to be sold, and induced the plaintiffs to purchase it, was a necessary party to the suit. The revenue sale has been set aside by the High Court. The judicial sale was void for failure of consideration, and for want of power in the Court to sell the money. S. 205, Act VIII of 1859, is modified by s. 237. If the appeal to the Privy Council be successful, neither the purchaser of the talook nor the judgment-creditor would be a loser. The sale was valid in the first instance. It is by the proceedings of the defendant, Ramtuhul, that his interest in the sum of Rs. 35,000 has vanished. He has got back the talook, and the question now is whether the Court

(1) 4 B. L. R., App., 35.

(3) 5 Bom. Rep., O. C., 83.

(3) 4 B. L. R., F. B., 11.

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would allow him to retain the talook, as well as the amount paid by the plaintiffs for its purchase. It was no voluntary payment of the debt of Ramtuhul. The payment was made through Ramtuhul's agent, that is, the Court for the purpose, of Ramtuhul, for something sold in which he had no right. It is payment to him for a consideration which has failed. *Sheikh Mahomed Basirulla* v. *Sheikh Abdulla* (1) is not applicable to the present case, as it is an eviction, not by a third party, but by the person himself who has used the money paid to the plaintiff for the purchase of his interest. The pendency of the appeal before the Privy Council does not alter the case. If the revenue sale be set aside, the purchaser at the sale will be entitled to his purchase-money, and Ramtuhul will take back his property. If the sale be confirmed, the purchaser will take the talook, and Ramtuhul will be entitled to the purchase-money, the plaintiffs waiving their right to the surplus proceeds of sale.

Baboo *Unnodapersaud Banerjee*, on the same side, contended that, if the order of the Civil Court had been for payment to the decree-holders of the surplus proceeds of the revenue sale, instead of the order for sale of the surplus proceeds, the judgment-debtor would have had, under s. 34, Act XI of 1859, to pay the amount so taken away before he could obtain possession, although by a different proceeding the debt of the judgment-debtor is satisfied. Upon the same principle, the defendant, Ramtuhul, cannot be permitted to have the sale annulled, and at the same time retain the benefit of the money paid by the plaintiffs, and applied towards satisfaction of his decree.

The *Advocate-General* contended that the case of *Sheikh Mahomed Basirulla* v. *Sheikh Abdulla*(1) was applicable to the present case. The purchaser is not entitled to get back his money as, the judicial sale has not been set aside. The revenue sale is not finally set aside since the appeal to the Privy Council is pending. The plaintiffs have no right of

(1) 4 B. L. R., App., 35.

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action. Even if the sale be invalid, they have no right to recover the amount. The payment was not made at the request of Ramtuhul nor to his use. There is no case in which the Court has been considered an agent for the judgment-debtor. The claim may be against the judgment-creditor. The sale was not effected by Ramtuhul. There was no agency in the Court. There is no privity between the judgment-debtor and the Court. The subject of sale was the money in deposit in the Collectorate. When a person with his eyes open purchases a thing, and afterwards finds that the judgment-debtor has no title, he cannot say that the consideration has failed.

Baboo *Abinash Chunder Banerjee* for the respondent, Baijnath Sookul, contended that there was no cause of action against the decree-holder. The plaint discloses no cause of action against him. If the judicial sale is valid and there is no contention against its validity, any act done by the judgment-debtor cannot be set up against the decree-holder.

Baboo *Unnodapersaud Banerjee*, in reply, cited *Rambux Chittangeo* v. *Modhoosoodun Paul Chowdhry* (1).

The judgment of the Court was delivered by

COUCH, C. J. (who, after shortly stating the facts, continued).— The case of *Sowdamini Chowdrain* v. *Krishna Kishor Poddar*(2) is different from the present, and the decision there does not, I think, apply to it. There the plaintiff had lost the property which he had bought in consequence of its being found that the judgment-debtor had no title whatever to it, a third person having recovered it by showing that he was the person lawfully entitled to it. In the present case, the loss to the plaintiffs was caused, not by the judgment-debtor having no title to the property, but by his asserting his title, and by virtue of his getting the sale set aside. He has obtained a decree of this Court by which he has recovered the property, and if the plaintiffs do not succeed in the present suit, he will not only

(1) Ref from S. C.C., Kishnaghur, 15th April 1867. (2) 4 B. L. R., F. B., 11.

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keep it, but will get debts to the amount of Rs. 8,000, for which his property was liable to be attached and sold, paid with the plaintiffs' money.

I think the rule that ought to be applied in this case is that which is applied by Courts of Equity, where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale. Lord Cottenham, in *Bellamy* v. *Sabine* (1), says as to such cases:—" The Court proceeds upon the ground that as the transaction ought never to have taken place, so the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction." That rule is applied by him in the case quoted to the setting aside a conveyance on account of fraud and ordering a reconveyance. If in such a case the purchaser is to have back his purchase-money, it is equitable that he should in the present case. The rule is also applied where an annuity is set aside on account of a defect in the memorial ; an account is taken, and the defendant, the purchaser of the annuity, is allowed his principal and interest and costs. The remarks of the Subordinate Judge in regard to the nature of this purchase by the plaintiff, might, in many cases, be applied to the purchase of an annuity, frequently a very speculative transaction. There is also another instance which may be mentioned, in the case of *Belcher* v. *Vardon* (2), where securities were set aside on account of usury at the instance of the assignees of a bankrupt. In that case, the defendant had leave to prove his advances with legal interest.

I am of opinion that the rule ought to be applied in the present case, and that the plaintiffs are entitled to be restored to the position in which they would have been if the sale for the Government revenue had not taken place. It is a mistake to apply to a case like the present the rule stated in Addison on Contracts as to voluntary payments. The payment here was not voluntary ; it was made on account of the purchase, and is not to be regarded as a voluntary payment. It is true that the plaintiffs were not parties to the sale and purchase which was

(1) 2 Phillips, 425, see 442. (2) 2 Collyer, 162, see 175.

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set aside. They bought the interest in the surplus, but the consequence of the judgment-debtor succeeding in setting aside the Government sale was to obliterate the surplus and prevent the plaintiffs from getting any part from it. I think the proper course would have been to have made the present plaintiffs parties to the suit for setting aside the Government sale, if the purchase by the plaintiff was confirmed before the hearing of the suit, as they had an interest in the sale not being set aside, and would be affected by the result. It does not appear when the suit for setting aside the sale was heard. If they had been parties to that suit, the Court, in making the decree setting aside the sale, ought, and, it must be presumed, would have directed that it should be set aside upon the plaintiff therein paying to the present plaintiffs the money which they had paid. Lord Cottenham says in the passage which follows the one I have quoted :—" In setting aside sales of this kind, the Court considers the purchaser as in the situation of a mortgagee, so far as he has made payments in consequence of the sale." On that ground therefore, I think the plaintiffs are entitled to succeed in the present suit, and to recover what they have claimed for the principal money and interest.

In consequence of an appeal being now pending in the Privy Council, it is necessary to declare that, should it be successful and the decree of this Court be reversed and the sale for arrears of revenue stand good, the present plaintiffs are not to have any rights whatever in consequence of it. By bringing this suit, they elect to consider the sale as set aside, and to have back their purchase-money. Having made their election and treated the sale as set aside, they cannot take advantage of any decision that may be made by the Privy Council reversing that. They must abide by what they now ask for, and the sale, so far as they are concerned, must be treated as finally set aside.

Then the next question to be considered is in regard to the costs. The plaintiffs have shown that they are entitled to succeed in the suit, and the person who is liable to pay the money is the first defendant, Ramtuhul Singh, and he ought to pay the plaintiffs' costs of the suit.

As to the second defendant, the representative of Sheo

Pershad Singh, he attached the surplus in the hands of the Collector, which he had the right to do, but then he ought to have ascertained whether, instead of putting up to sale the share of the surplus, which seems to have amounted to more than Rs. 35,000, he could not have obtained an order to have the amount which was due to him, Rs. 4,970-9-3½, paid to him. His conduct appears to be such that he ought not to receive his costs, but ought to be made to pay them himself.

As to the third, fourth, fifth, and sixth defendants, namelythe other decree-holders who were paid out of what remained of the purchase-money paid by the plaintiffs after satisfying Sheo Pershad Singh, they do not appear deserving of any blame. They received their money from the Court out of what remained after satisfying the attaching creditor, and they ought not to have been made parties to the suit. The plaintiffs must therefore pay their costs.

There will be a decree accordingly, and the plaintiffs will recover from the first defendant the amount claimed with costs.

*Appeal allowed.*

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*Before Sir Richard Couch, Kt., Chief Justice, and Mr, Justice Kemp.*

SITARAM, *alias* KERRA HEERAH, (DEFENDANT) *v.* MUSSAMUT AHEEREE HEERAHNEE (PLAINTIFF).*

1873 *May* 9.

*Hindu Law—Marriage—Public Policy—Void Contract—Assam.*

A contract entered into by Hindus living in Assam by which it is agreed that upon the happening of a certain event, a marriage is to become null and void, is contrary to the policy of the law, and a suit cannot be maintained upon it.

IN this case the plaintiff sued to have her marriage with the defendant cancelled, alleging that he had violated the conditions of a bond executed by him before his marriage with her, by which he engaged to consider his marriage void if he ever left

* Special Appeal, No. 686 of 1872, from a decree of the Assistant Commissioner and Subordinate Judge of Burpettah. dated the 15th January 1872, reversing a decree of the Munsif of that District, dated the 9th September 1871.